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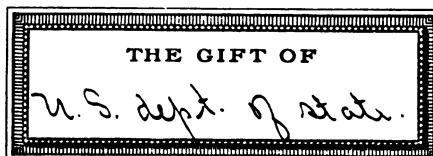
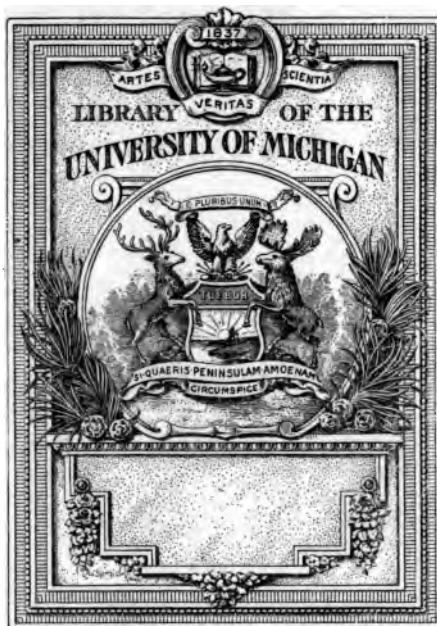
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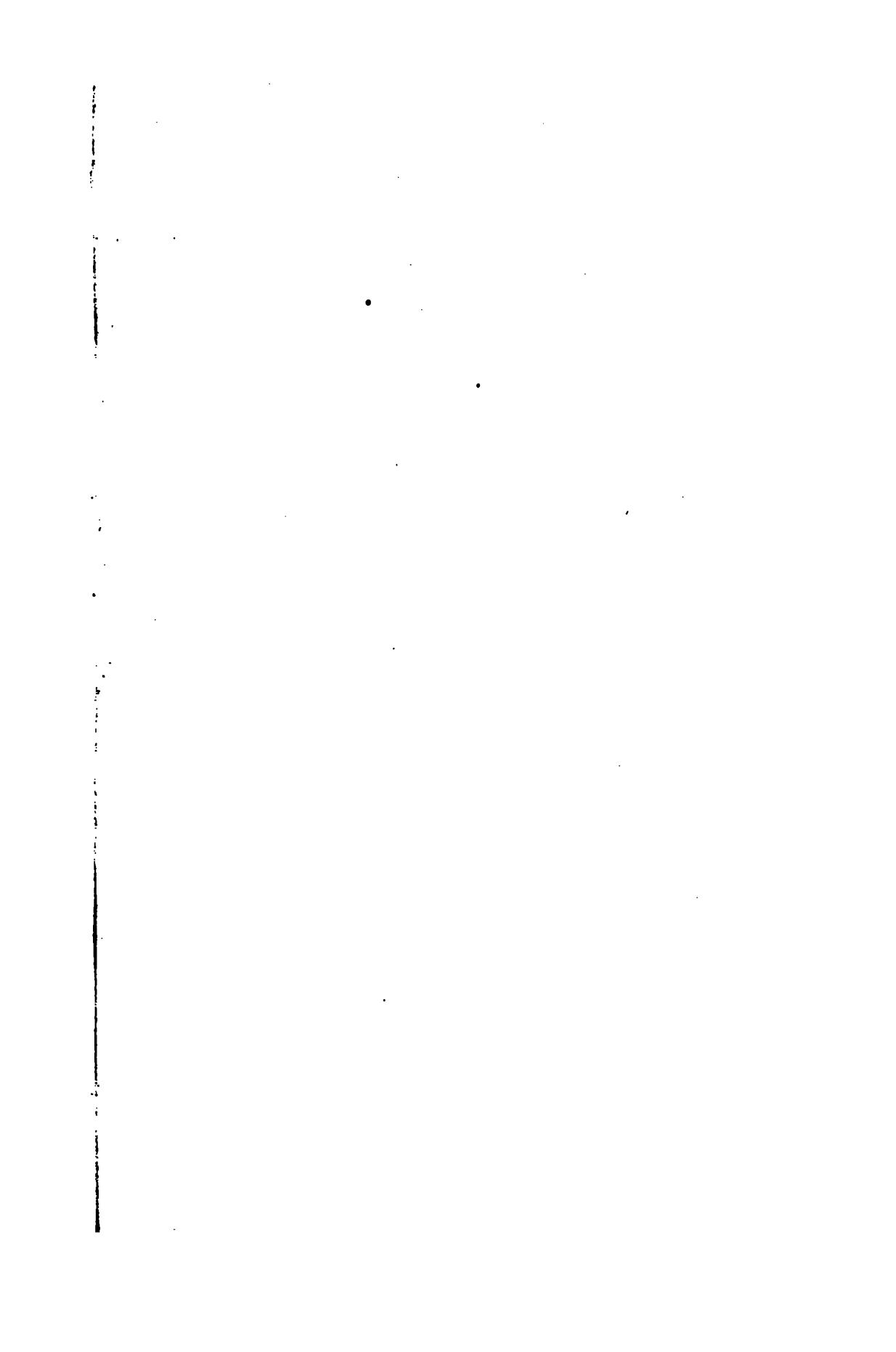
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REPORTS

PREPARED FOR

THE INTERNATIONAL PRISON COMMISSION.

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S. J. BARROWS,

COMMISSIONER FOR THE UNITED STATES.

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DEPARTMENT OF STATE,  
*Washington, February 25, 1901.*

SIR: I have the honor to inclose herewith copy of a communication from Mr. Samuel J. Barrows, United States commissioner on the International Prison Commission, transmitting monographs on the penal codes of France, Germany, Belgium, and Japan, together with a paper on the Japanese prison system.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

Hon. DAVID B. HENDERSON,  
*Speaker of the House of Representatives.*



## LETTER OF TRANSMITTAL.

INTERNATIONAL PRISON COMMISSION,

*135 East Fifteenth street, New York City, February 23, 1901.*

SIR: I have the honor to present herewith monographs on the penal codes of France, Germany, Belgium, and Japan. These monographs have been prepared by specialists distinguished in their respective countries for their knowledge of criminal law and procedure. They furnish interesting material for comparison with the penal codes of the United States and of the constituent States of the Union, in the work of code revision.

A paper on the Japanese prison system, prepared by the minister of justice of Japan, which accompanied his article on the Criminal Code of that country, is likewise submitted as an interesting presentation of progress in Japan.

I remain, sir, your obedient servant,

S. J. BARROWS,

*Commissioner of the United States on  
International Prison Commission.*

Hon. JOHN HAY,

*Secretary of State, Washington, D. C.*



## INTRODUCTION.

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The chapters on the French penal code and on penal procedure are placed first in this report because they stand in a historic relation to those which follow. Germany, Belgium, and in fact most of the countries of continental Europe were greatly influenced in penal legislation by the reaction in France in 1791 against cruel, archaic codes, the heritage of centuries, and by the development of the code of 1810, which after repeated revisions still remains the basis of the French law. This historic relation is set forth concisely in the opening pages of each of the monographs which make up this report.

These papers on the French penal code were originally prepared for submission to the Fifth International Prison Congress, held in Paris in 1895. In their preparation some of the most eminent jurists in France were engaged, and the monographs, with other valuable matter relating to the prison system of France, were published in a volume by La Société Générale des Prisons, a society whose influence in penology is felt throughout the world. Senator Bérenger, who contributes the opening paper, is a member of the institute, vice-president of the French Senate, and honorary president of La Société Générale des Prisons. He has won distinction in his own country and among penologists in both hemispheres as the author of the law granting the judge the power to suspend the execution of the penalty in cases of first conviction, a law which is generally known as the "loi Bérenger." Professor Jarno is professor of the faculty of law at Rennes and Prof. Le Poittevin professor of the faculty of law in Paris. Both gentlemen are members of La Société Générale des Prisons. The articles represent, therefore, the highest authorities as to the history and interpretation of the penal law of France.

The translation has been made by Miss Maud Stalnaker, of the Department of State, U. S. A., who has had to cope with many difficulties in dealing with French technical legal terms which do not find exact equivalents in our own legal terminology. For that reason American and English technical terms have often been avoided as too much constraining the meaning of the original, and conveying the idea that methods or institutions are identical which are marked by strong points of difference. The translation has had the advantage of the revision of its eminent authors. Professors Jarnot and Le Poittevin have not, however, confined their revision to matters of phraseology; they have made additions and excisions in the body of the text, and supplied references and footnotes. Thanks are due to

these gentlemen for their laborious cooperation. The important changes which have been made in French criminal procedure since 1895 have demanded special attention on the part of Professor Le Poittevin, who has taken great pains to indicate them.

The article on the criminal law of the German Empire was written, at the request of the American commissioner, by Prof. Wolfgang Mittnermaier, then of Heidelberg, but now of the University of Bern, Switzerland, whose knowledge of English has enabled him to write directly in that language. The reputation which his father attained in penology and jurisprudence has since been extended by his son. The text of changes in certain articles of the German criminal code made in the year 1900 have been kindly communicated by Dr. Hermann Adami.

The chapter on the Belgian Criminal Code was prepared by an equally eminent authority in that country, Prof. Adolph Prins, university professor of law at Brussels and inspector-general of prisons, and appeared as a contribution to *La Législation Pénale Comparée*, published by l'Union Internationale du Droit Pénal. Professor Prins has shown how, after eighteen years of study and discussion, the penal code of October 15, 1867, now in force, was completed, and supplanted the harsher Napoleonic code of 1810. The defects of that code, as compared with the higher standards of modern civilization, are strongly set forth in this article. In its code of 1867 Belgium made a notable step in the direction of humanity and justice, which was further extended by the adoption of the law of May 31, 1888, on conditional sentence and conditional liberation.

If Japan is building up her navy and her schools and colleges, she is developing with persistent progress her penal law and institutions. To an eminent Japanese statesman, the Hon. Keigo Kiyoura, formerly minister of justice, I am indebted for the article on the Japanese Code of Criminal Procedure. This paper was originally prepared last fall for the Prison Association of New York, and its use kindly permitted for this report. It is interesting to find that some of the more progressive features of modern European codes have been adopted in Japan and that more changes in this direction are contemplated.

As an illustration of the further progress of Japan, I have been glad to avail myself of the generosity of the same eminent statesman in printing his contribution on Japanese prisons and their administration. In its centralization of prison administration, its department of prison statistics, its school for prison officers, the assignment of earnings to prisoners, the improvement of prison dietaries, the introduction of reform schools, the development of the Prison Association of Tokyo, with a membership of 10,000 persons, the organization of 25 societies for aiding discharged convicts, Japan has taken a place in the forefront of civilized nations.

SAMUEL J. BARROWS.

## THE FRENCH PENAL CODE.

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### TENDENCIES OF PENAL LEGISLATION.

BY SENATOR R. BÉRENGER,

*Vice-President of the French Senate, member of the Institute, and honorary president of the General Society of Prisons.*

It is the pride of our penal laws, which in their work of social reparation and defense were so deeply stamped by their author with the philosophical ideas prevalent at the close of the last century, that they took as the foundation of punishment the free will and moral responsibility of man.

The French school does not underestimate the utility of any scientific research which might increase the insight of the magistrate in the difficult task of penetrating the mystery of human actions, or which might inspire him with greater circumspection in his judgments, but it rejects extreme conclusions. Science is confined to the investigation of those natural phenomena which by their very tangibility are capable of analysis. It may, through these discoveries, exercise a legitimate influence in the domain of morals, but it can not properly govern it. We are no more willing to accept these new systems with the modifications which have been effected by recent compromises than in their original unqualified condition.

Whether the determining cause of the actions of man be attributed to his physical constitution, to hereditary or accidental impairment of the cerebral functions, or to any form of irresistible compulsion due to the influence of surroundings, to outside suggestion, or to any other external cause, the doctrine of fatalism—that is, of materialism slightly disguised—must always be admitted.

It has never been denied that these powerful causes modify in various measures the degree of culpability, and should have influence in changing the degree of punishment. Our penal legislation has freely acknowledged this in the following way:

By declaring total lack of responsibility in cases of mental alienation, or those in which the culprit was constrained by a force which he could not resist.

By proclaiming that certain acts are excusable, especially those actuated by legitimate defense, by provocation, or by the command of a superior, and those atoned for by certain conditions of reparation.

By obliging the judge to declare himself, when the culprit has not reached the age of 16 years, in regard to the existence of discernment.

By admitting the modification of the punishment in case of extenuating circumstances.

And, more recently, by granting the judge the power of suspending the execution of the penalty in cases of first conviction.

To go further would be to subserve the conscience to a sort of fatalism, to substitute for free will the tyrannical doctrine of material necessity,

and to definitely supplant the magistrate by the scientific expert or the physician.

It is not sure that the certainty of verdicts would gain by such a change, for the exact formulas of science do not protect their most eminent advocates against diversity of opinion or ardor of controversy. But it is obvious what confusion of ideas would result, what impediments would be placed in the way of judicial action, what extenuation would be granted to all offenses; that is to say, the idea, so essential to social existence, of the right of punishment would be enfeebled and the principal guaranties of public order and security would be abandoned, to the profit of crime.

There is another consequence, not less important. If man, dominated by these blind forces, is but their passive subject, he is no more responsible for the good he does than for the crime he commits, and there is no more justice in rewarding than in punishing him. What inducement can be, then, offered for effort, what stimulation to reform? All the moral forces with which penal science has surrounded his weakness—anticipated liberation, pardon, patronage, rehabilitation—have no further reason for existence. Religious sentiment itself, that fertile source of efficacious repentance, loses all sanction. It would mean the failure of all ideas of reform.

We adhere, then, to the tradition of our codes.

The second question is not less important. Humanity demands that there shall be added to the infliction of punishment nothing destined to produce physical suffering, or the yet more cruel forms of degradation which were so common in ancient law. But social interest, in turn, demands that the modification of severity in the management of prisons should not become exaggerated; that a regrettable contrast between the condition of the prisoner and that of the honest workman or the soldier should not be made prominent.

It is necessary that the penalty shall be severe (though always humane) if it is intended that it shall be effective by the fear it excites and by its remembrance. This is one of our principal reasons for preferring the system of isolation—the special severity of which does not admit advantages which the culprit has not always enjoyed when free—and also for committing to the directors of prisons different administrative functions formerly exercised by private contractors. This is more compatible with the maintenance of strict discipline.

Finally, as we have already said, we have not relinquished any of the moral forces which can assist in the reformation of the culprit, and in this respect the spirit of our law is in complete accord with our sentiments. If there is one point in which persevering and continuous progress during more than half a century has been made it is certainly that of ameliorating our penal system in this respect. No legislation has gone further than ours. Our codes recognized the necessity of assuring the protection of society by the correction as well as by the punishment of the criminal; this is proved by the expression “correctional” applied to certain tribunals and to the punishments of which they have charge; but, influenced by the spirit of the times, they sought to obtain this correction by intimidation. The United States was the first country to understand the inefficiency of a system the foundation of which was so narrow. It endeavored assiduously to make the methods of executing penalties promote the same end, either by labor and silence, combined with individual separation during the night, or by absolute isolation, which was considered both the best preventive of the demoralization caused by contact and the surest aid to repentance and salutary reflection. A new object was

thus offered for the researches of moralists. It was designed to add to the effect of intimidation the influence of an education by moral discipline, calculated to incite personal effort on the part of the condemned.

It is known how eagerly the philanthropic spirit of Europe adopted these ideas. In a short time complete examples of the two systems were found in the majority of the countries, and the school of penitentiaries was founded. Nor did the movement stop there. As soon as the advantage of associating the condemned in the work of his reformation was recognized the natural consequence was to endeavor to arouse his interest by all legitimate means.

In 1830 one of our most eminent writers on penal subjects, Charles Lucas, laid down as a principle the necessity of a rational system of recompenses during the term of punishment. Adding example to precept, he soon instituted as an experiment, in his capacity of general inspector of prisons, conditional liberation in favor of imprisoned minors. The success of this plan rapidly demonstrated its justice. The majority of legislations borrowed the principle from us and developed it by applying it to adults; and, following a step further in the same direction, we have extended the principle to penalties of long duration. (Transportation—law of May 30, 1854; other penalties—law of August 14, 1885.)

This is, in fact, making pardon conditional on repentance and good conduct after condemnation. This idea should be carried further. If the pardon is of itself a restraining influence, as experience seems to indicate, if the power it exercises is strong enough to interest the culprit in behalf of his own reform, why not endeavor to insure its effect before the infliction, or at least before the execution of the penalty? "Benevolence," says an eminent judge, "is a form of justice." Is it not, we add, one of the greatest moral forces, the most powerful metaphysical means that can affect the human heart? It elevates instead of debases; it reawakens the sentiment of honor, reanimates confidence, resuscitates energy. How many natures, even after grave offenses, are responsive only to harshness?

It is to the honor of modern science that it has accomplished this veritable revolution in the repressive system of our time, of giving pardon an equal place with punishment as the means calculated to bring about the reformation of the culprit.

The initiative in this movement did not belong to our country. Admonition, warning, suspension of sentence, the first forms of the new idea, were evolved elsewhere. But we have advanced further than any other in this direction.

The law of March 26, 1891, the principles of which Belgium adopted before they were confirmed by our Parliament, and the main provisions of which most legislations are prepared to follow, contains two important innovations. The penalty is pronounced, its execution alone is suspended. If a new sentence is imposed during the period of probation, the two penalties are independently enforced. This gives effective sanction to the indulgence which had been accorded.

The privilege of the law is extended to all correctional sentences, whatsoever the nature of the crime or the duration of the punishment. This includes cases in which extenuation of the punishment has been granted, and allows a vast field for action.

Is this the limit of result of this principle? We permit ourselves to hope the contrary. The idea is too fertile not to be capable of wider application. An attempt in this direction is even now being made. The French Senate is considering a proposition of law relative to the

repression of certain outrages, the repetition of which constitutes the chief menace to morality. The principle is that the criminal can be prosecuted only when he has received, within a specified time, a previous admonition from an officer of the judicial police, after inquiry has been made and the prisoner has been heard.<sup>1</sup> It is the warning before the prosecution.

How many unhappy creatures could be stopped in their downward path, how many crimes avoided, and misdemeanors prevented, if this practice could be generally adopted?

But the best institutions, those which rely especially on moral influences and the progress of which is dependent upon public opinion, can not accomplish the most effective results if they are not surrounded by means to complete and sustain them. Works supported by patronage, institutions for abandoned infants, for the protection of young criminals, societies studying to ameliorate the law, are particularly indispensable to the development of penal reform.

Our epoch has been actively interested in the establishment of these institutions, and nowhere has the work been more successful than in our country. The law of June 5, 1875, on the transformation of prisons where short penalties are inflicted, created a superior council of prisons, with the object of watching and encouraging the development of reforms. The General Society of Prisons was formed soon after, having the same object and under the influence of eminent men. One of its principle efforts was to disseminate ideas of patronage. The numerous special congresses, as well as the central bureau recently organized by the General Society of Prisons, are responsible for the multiplication of these institutions.

A parallel movement, inspired by one of the most generous spirits of our times, attained, perhaps, even better results in the work of protecting children. Paris now has more than ten institutions of this kind, without speaking of the special work of the bureau of public assistance and the innumerable charitable societies devoted to the alleviation and education of poor children. Every day new institutions of this sort are founded in the provinces. The society to defend children in court adopts and propagates all projects of reform from which any practical amelioration can arise.

Finally, an influential movement has sprung from the idea of giving an opportunity to work as a means of assistance—the supreme effort of philanthropy against vagabondage and mendicancy.

In the midst of this progress, so characteristic and so pronounced, we welcomed the International Prison Congress of 1895. Two ideas were prominent—to strengthen repressive action by a wiser execution

<sup>1</sup> Provision of law concerning prostitution and outrages to propriety:

ARTICLE 1. Whoever, after a warning given within less than one year by an official of judicial police, after inquiry is made and the prisoner has been heard or duly summoned, is again found decoying on the public road or in places freely accessible to the public, shall be punished by imprisonment of from six days to one month.

ART. 5. Any person renting furnished houses or apartments, who, after warning given under the conditions of article 1, shall knowingly favor or facilitate debauch by receiving women or girls whom he knows come as prostitutes, shall be punished by imprisonment of from three months to two years and a fine of from 100 to 1,000 francs.

ART. 6. Under the same conditions there will be subject to similar punishments all restaurant keepers, saloon keepers, and other dealers in liquor to be drunk in the establishment, who knowingly furnish to immoral women or girls, whether employed in their establishment or not, the means of prostituting themselves.

of the penalty, and to develop preventive institutions, which have been too much neglected in the past, and to assign them a place where they can exercise their corrective influence. It is by combining the two grand forces of indulgence and severity that we shall find the secret of practical reform.

Such are the aspirations of our penal legislation. Such is the spirit of the different parts of this work.

To complete the table of modifications made in recent years in French penal legislation the following laws may be mentioned:

1. The law of November 15, 1892, under which imprisonment while awaiting trial may be counted as a part of the duration of the penalty, unless the judge has ordered otherwise.

2. The law of June 8, 1895, relating to the revision of criminal and correctional processes. It authorizes a demand for revision in a general manner, independently of circumstances or facts previously presented, where a fact, proof, or document, unknown at the time of the trial, is submitted of a nature to establish the innocence of the condemned person. The same law accords an indemnity to the victim of judicial errors.

3. The law of March 16, 1898, concerning outrages against good morals.

4. The law of April 19, 1898, for the repression of cruelty to children, one of the most important provisions of which gives to the magistrate the right to assign to charitable societies or individuals or to public authorities the guardianship of children whose parents have been judged unworthy of this responsibility.

5. The law of August 5, 1899, and that of July 11, 1900, concerning the police record (casier judiciaire) and the re-rehabilitation of individuals. It limits the number of condemnations which in future may be mentioned on the bulletin delivered to the parties, and fixes a limit of two, five, or ten years, according to the gravity of the condemnation, in favor of the individual who has not incurred new condemnations to imprisonment, and restores him to his full rights on the same conditions at the end of five, ten, or fifteen years.

A sufficient number of propositions have been made or are in preparation to abridge the time of detention while awaiting trial; to permit in certain cases correctional tribunals to pronounce acquittal in spite of the proven commission of misdemeanors; and relating to different modifications of the law of March 26, 1891, relative to the suspension of the execution of the penalty.

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#### CRIMINAL LAW.

BY E. JARNO,

*Professor of the Faculty of Law at Rennes and member of the General Society of Prisons of France.*

Our criminal legislation, as it exists to-day, awaiting the result of the plans of reform now under discussion, has its source in the codes of the first empire, Le Code d' Instruction Criminelle of 1808, for procedure, and Le Code Penal of 1810 for the basis of its laws. This latter code particularly, notwithstanding various modifications, remains the basis of our ordinary penal legislation, of which it con-

tains the fundamental principle. Our legislation thus traces its origin to the beginning of the century. Since it bears in more than one point marks of age, and in certain parts appears obsolete and not abreast of the state of morals and the progress of penal science, it is not surprising that a revision is necessary. Several of our neighboring nations, long governed by our Penal Code, have already made this indispensable reform. Belgium altered certain parts in enacting her code of 1867; later, Holland, in her code of 1881, made more extensive changes. Instead of merely reforming our code, as was done by Belgium, an entire reconstruction of the penal system of 1810 was enacted.

Following the example of other countries, a commission, composed of eminent criminal authorities, has been appointed in our department of justice. It has been charged with the duty of preparing a revision of our penal institutions. The commission has already discharged an important portion of its task by the elaboration of a plan containing the general theories of lawbreaking (*l'infraction*) and a new system of penalties. It is thought to be an opportune moment to compare our present penal legislation with the proposed changes.

This is what we propose to do in this short work, after having hastily reviewed the origin and development of this legislation from the end of the last century and during the present century. We shall not consider the system of penalties, which should be made the subject of a separate study.<sup>1</sup>

#### THE ORIGIN AND DEVELOPMENT OF PENAL LEGISLATION.

Without tracing historical precedents further, it may be affirmed that the code of 1810 and our penal legislation, which is still based thereon, had their origin in the current ideas and opinions which marked the close of the last century and which have been the starting point of the penal reformation of this century, in many European countries. The code of 1810 (as well as the code of the Revolution, upon which it was modeled) was one of the first products of this movement of reform. It has also aided in a great measure in the propagation of reform principles, either by its application or imitation by foreign governments.

The old penal laws were singularly imperfect. They included only the fixed and uniform rules for procedure which had been established by the royal ordinances. The last and most important of these is the ordinance of August, 1670, enacted under Louis XIV, and which may be termed the code of criminal provision of the old monarchy. It formed in reality no substructure for law. Although it included numerous ordinances relative to penal subjects, they were either measures of expediency and convenience or had reference only to special offenses.

The penalties were carelessly outlined and given only in the scat-

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<sup>1</sup> This examination, although independent of the project of reform of our penal institutions, is of special interest on account of the general condition of legislative reform. The latter has given rise in the last third of the century to many of the codifications of the foreign penal laws from the Belgian code of 1867, which I have just described, to the recent Italian code of 1889. It has also caused a conflict of theories and doctrines concerning penal matters, in which some persons have seemed to desire nothing less than a complete revolution of the ancient principles of criminal legislation.

tered ordinances, when, indeed, they were not abandoned to the arbitrary decisions of the judge. There were no general ordinances or efforts to remedy, by the establishment of a code of penal laws, the prevailing confusion and uncertainty of legislation. It consisted of an unsystematic arrangement of provisions of every origin—royal ordinances, special or general customs, canonical laws, Roman purviews, exhumed and resuscitated, etc. It was a veritable chaos of legislative forms, into which the commentaries of criminal experts and the fias of jurisprudence were unable to introduce systematic unity. The vagueness of this legislation made it necessary to leave to the discretion of the magistrate the estimation of offenses and the determination of punishments. This resulted in arbitrary and unjust penalties, varying according to the case and the persons involved, sometimes so severe as to be barbarous, sometimes so indulgent as to practically grant immunity.<sup>1</sup>

The ancient penal practice was sanguinary and cruel. Until the eighteenth century criminal justice preserved almost intact its barbarous mediæval forms of torture and punishment. Those penalties depriving the criminal of liberty formed but a small portion of the penal system; corporal punishment formed its basis. Death in various forms—quartering, the pillory, the rack, decapitation, the gibbet, flogging for the less important offenses—all varieties of bodily mutilation were included. Death following torture or the preliminary punishment was a sentence commonly imposed, and for the slightest offenses. Jousse, in his treatise published in 1771, recounts not less than 115 cases of the application of this penalty. The judges were able, in case of grave offenses, to repeat and multiply the tortures, thus inflicting the most extraordinary punishments.<sup>2</sup>

The penalty did not even cease at death; for many crimes prosecution continued after demise and was visited upon the body. The harshness of justice was not limited to the culprit; the punishment sometimes was extended to his children and relatives, in case of insult to the highest in authority (*lèse majesté au premier chef*).<sup>3</sup>

The exaggeration and the absurdity of the criminations were equaled by the atrocity of the punishments. Our ancient penal legislation did not limit itself to repressing criminal attempts against individuals or property, or against public authority and sovereignty, but, under the influence of the canonical laws which contributed to its formation, it compared offenses against religious faith to those against the state. This was the consequence of the prominent position occupied by religion and the church in ancient society, of the importance of its rôle in our history and the confusion of the two orders, civil and religious, which characterized the ancient régime. There was a long list of crimes against the divine authority (*lèse majesté divine*), heresy, sorcery, sacrilege, blasphemy, suicide, etc., the greater number of which were punishable by burning. It was the inconceivable extension of the application of these prosecutions during the middle ages and up to the sixteenth century that made that epoch famous for its sanguinary and merciless penal laws.

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<sup>1</sup> Without mentioning the inequalities of the law, the penalties vary according to the condition of the culprit.

<sup>2</sup> As in the famous decision rendered by the Parliament of Paris against Damiens, the pitiable imbecile who had attempted to take the life of Louis XV.

<sup>3</sup> Even apart from this case, and for ordinary crimes, they were indirectly affected by the general confiscation of property—a sentence always pronounced against the culprit in important penal cases.

It was the contest against these penal practices, maintained by tradition, but becoming less and less in harmony with the prevailing ideas and customs, which colored the philosophy of the eighteenth century.

This struggle in favor of penal reform was but an episode in the more general war declared against all abuses and prejudices. This is not the place to estimate the force of this grand and singularly complex movement; it is sufficient to state here that nowhere was it more justified and its results more widely beneficial than in the domain of penal reform. Its initiators were in this, as in other provinces, the illustrious men of the eighteenth century—Montesquieu, in his *Esprit des Lois*; Voltaire, the great intellectual agitator of the epoch; Rousseau, the encyclopedists in general, President Dupaty, etc. But the movement was not restricted to France; it extended to foreign countries, especially to Italy. It was in this classic country that a work was published which descends to posterity as the principal monument of this progress of law, and the publication of which marked an important era in the history of penal institutions, the *Traité des Défauts et des Peines*, by Beccaria, published at Milan in 1764. In this work, which is the eloquent protest of a just mind and a generous heart revolted by the atrocities of the ancient order of penalties in Europe, the author, the avowed disciple of our French writers (and particularly of Montesquieu,<sup>1</sup> under whose authority he placed himself) endeavored to summarize, in a style sometimes a little declamatory, but always warm and vigorous, the grievances of philosophy against the penalties of the previous century; to collect in a body of doctrines the scattered ideas of reform found in the works of contemporary writers, in order that there might be established a foundation for a new repressive system more in accordance with justice and humanity. The work appeared at the proper time. It was translated into French by Morellet; commentaries were written by Voltaire and Diderot; it was widely read and talked of, and in fact struck the deathblow to the ancient order of penal institutions.

Thus, in order to found a new penal system, which, according to the instructions received by the deputies, was the mission of the Constituent Assembly, the latter needed only to legally sanction the results and the principles evolved from the critical philosophy of the eighteenth century. This action the assembly hastened to take in the famous declaration of rights of the 26th of August, 1789, and in the acts which followed, especially the law of January 21, 1790, on the reasonable punishment of crimes and offenses. It includes most of the fundamental principles of our modern penal legislation. The actual law is as follows:

1. The necessity, in order that a person can be the object of criminal prosecution, of a law enacted before his crime, to foresee it and provide the punishment therefor. (Art. 8 of the declaration.) It is the chief axiom of the modern codes, "Nullum crimen, nulla poena sine lege," in opposition to the arbitrary rulings of the ancient law.

2. The restriction of the penal law to the sphere of social interests and of acts offensive to society (those alone which the law can and should punish), to the exclusion of offenses against morality and religion, which from that time rest in the domain of individual liberty.

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<sup>1</sup> In several chapters of the *Esprit des Lois*, published in 1748 (see Book VI, chapter 3, and following; Book XII; Book XXV, chapters 12, 13, etc.) may be found a profound and comprehensive criticism of the faults of our old legislation, written with the conciseness and irony characteristic of Montesquieu. Most of the ideas developed by Beccaria are found here.

(Art. 5 of the declaration.) This was the result of the new principle of liberty of religion and conscience, proclaimed in article 10; the emancipation of society and the civil law by the separation of the two domains, civil and religious, which had previously been confounded, and the complete suppression of the ancient criminations of "divine lèse majesty."

3. The restriction of the penalty according to the social need, the law having power to enact only those punishments which were actually necessary to social interests. (Art. 8 of the declaration.) This was in the nature of a reaction against the extreme and uselessly atrocious penalties of the ancient law. The idea of vengeance, which up to that time had inspired penal laws (at first private vengeance on the part of the injured person, afterwards public vengeance, whether inspired by social or religious motives), was replaced by a tendency to vary and to mitigate the punishments.

4. The principle of the equality of punishments, a consequence of the general principle of the equality of citizens before law and justice, and of the abolition of the ancient class distinctions and privileges; crimes of like character to be followed by like penalties without regard to the offender. (First article of the law of January 21, 1790.)

5. Finally, the principle of the restriction to the offender of the punishment, without its being extended to his heirs. This principle involved the abolition of the ancient penalty of the general confiscation of property. (Arts. 2 and 3 of the same law.)

It was on these principles as a foundation that the new penal system was erected. It was adopted by the Constituent Assembly and was incorporated in the law or Penal Code of municipal and "correctionel"<sup>1</sup> police of July 19, and in the Penal Code of September 25, 1791. The first of these is relative to the offenses punishable by municipal and "correctionel" police—our misdemeanors and trespasses (*délits et contraventions*) of to-day. The second is devoted to criminal infractions, strictly speaking, or misdemeanors (*délits*) of greater gravity, previously considered criminal—our crimes of to-day.

These two codes, and particularly the latter, which is the principal work of the revolution in penal legislation,<sup>2</sup> marked an immense progress over the ancient state of the law. For the first time we find a precise judgment of infractions and punishments; an undeviating and rational system of penalties, for which the past offered neither precedent nor model; a penal system taking account of the rights of humanity in the person of the culprit, and endeavoring to effect reformation by fear or by example. The ancient systems of torture and corporal punishment (aggravated forms of the death penalty, mutilations and tortures, branding, flogging, etc.) were abandoned. Punishments, privative of liberty under different forms and names, fetters or compulsory labor, solitary confinement, detention in custody, imprisonment, etc., formed the new basis of the penal system. Civil degradation or forfeiture of the rights of citizenship was prescribed as a punishment for lesser offenses, and transportation to the colonies at the expiration of the term of punishment for a repetition of the

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<sup>1</sup>The term "correctionel" is used in French law to signify those penalties which neither belong to the criminal order nor come under police jurisdiction.—Translator.

<sup>2</sup>The code of misdemeanors and penalties (*délits et peines*) of the 3d of Brumaire, year IV, the work of Merlin de Douai, is, despite its title, only a law of criminal procedure or instruction, intended to replace the law on criminal procedure of September 16, 1791, of the Constituent Assembly. This code was the model of the Code of Criminal Instruction of 1808.

offense. The penalties thus become simply privative of liberty, a characteristic that has become more and more prominent in modern codes, in place of the corporal punishments of the past. The death penalty, reserved for the gravest offenses, was itself reduced to the simple deprivation of life without mutilation or torture.

The modifications in the nature of the penalties extended also to their application to different crimes. The death penalty was set aside in more than 80 of the 115 cases, counted by Jousse, when such a punishment was applicable. This was accomplished either by suppressing the criminalizations themselves—crimes of *lèse majesty*, for example—or by substituting for the penalty of death punishments privative of liberty. These last penalties were also limited in duration, and even the most serious could not exceed twenty-four years (only deportation incurred by repetition of offenses was for life). The Constituent Assembly had refused to admit life sentences, considering them incompatible with the reform of the convicts. To remove the hope of release stifles any thought of return to better ways. This consideration was more weighty then than it is now, because in the reaction against the abuses in this line to which the old law was open the Constituent Assembly had abolished the right of pardon in criminal matters. Thus the perpetuity of penalties lacked the necessary corrective, which is to-day supplied by the possibility of pardon.<sup>1</sup>

This suppression of the right of pardon was not the only error into which the excessive reaction against the past led the Constituent Assembly. The old system of arbitrary punishments with its attendant abuses was so hated that the code of 1791 went to the opposite extreme. It was not satisfied to decide the nature of the punishment for every offense, it even decided the degree in an invariable manner, without leaving to the judge the latitude of a maximum and minimum; his authority was limited to deciding the guilt; he could in no way influence the scale of penalties. Once the guilt was recognized, the punishment enacted by the law was incurred, identical and uniform for all cases and for all delinquents. The judge was not able to modify the degree of punishment according to the variations of individual guilt or the thousand special circumstances which escape the foresight of the law and which the judge alone can recognize. The code of 1791 ignored this necessity, and it was not long before the inconveniences of this rigorous and narrow system (which reduced the judge to a machine in the application of the letter of the law) were apparent.

The code of 1791 was replaced during the Empire by the present code of 1810. This was part of the general codification of our laws, which was one of the first projects of the Consular and Imperial Government, and which is now one of its most permanent glories. The new codification had become necessary, so far as the penal laws were concerned, to harmonize the latter with the authoritative constitution and temperament of the new powers; the need of insuring the punishment of offenses (which had become uncertain and unreliable during the latter part of the revolution)<sup>2</sup> was also felt.

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<sup>1</sup> And of conditional liberation, which has been added since 1885.

<sup>2</sup> As a consequence of the crisis which had just troubled the country, public security was threatened by bands of malefactors, the débris of the civil wars, which resembled in a way the swarms of highwaymen of the middle ages. Under different names (chauffeurs, garotteurs, chouans, verdets, etc.) and sometimes with political pretexts, they harassed the roads and the country. Special laws were passed under the directory to apply to them; several provisions of the code of 1810 are directed especially against these bands.

Finally, it must be added that in spite of its merits, the code of 1791 had many omissions—an inevitable fault in a new and entirely improvised code. The general provisions especially were incomplete; it was notably indispensable to unite in the same code all the statutes regarding the various classes of offenses.

This was the task accomplished by the code of 1810. Profiting by experience and by the precedents of intermediary legislation, it was more complete and better developed in general, and superior as a whole. In spite of defects of form and method, it included in its provisions the series of ordinary infractions and the fundamental theories of the penal system.

As to the nature of the new code, it had the advantage, like the Civil Code and imperial legislation in general, of remaining faithful in its main outlines to the new principles introduced by the revolution into public law, such as the theory of equality before law and justice, and that of secularizing legislation—not without a few unfortunate exceptions and deviations, so far as the nature and the degree of punishment are concerned. In this last respect there was a marked return toward the spirit of the old law, if not toward the idea of vengeance at least toward that of intimidation, which considers the severity of the penalty the only guaranty of its efficacy. It has been thought that the influence of the utilitarian doctrines, which Bentham was so successfully expounding at that time, is apparent in this legislation. It is easier to recognize the influence of the contemporary political and social conditions, of which I have just spoken.

The code of 1810 reflected the tendencies of popular thought, and the general character of the Government; whence the general severity of its provisions—a severity much less than that of the old legislation, but which was nevertheless excessive and should have soon made a revision necessary. In this line it may be especially criticised for having so largely multiplied the cases in which the penalty of death was inflicted. This retrogressive spirit was even more apparent in certain excessive criminalizations, such as the provisions punishing the simple failure to reveal plots against the safety of the State, or cases of counterfeiting money (original arts. 103, 107, 136), and in the reenactment of a certain number of penalties which had been repealed by the Constituent Assembly—the preliminary amputation of the right hand in case of conviction for parricide, the branding upon the flesh the stigma of infamy, civil death, and even the general confiscation of property—renewed as a complementary punishment for certain crimes. Ulterior progress has made these provisions, and this system of punishment, gradually disappear from our legislation.

Although the code of 1810 is still the basis of our law, it has not escaped and could not escape changes which tempered its original severity. In default of a general revision, it has undergone partial revisions—one in 1832, another in 1863, as well as other special modifications at various times.

The first and by far the most important of these revisions, that of the law of April 28, 1832, was above all a reaction against the too great rigor of the code of 1810. As the military period of the Empire receded, the advent of peace and milder customs, the development of liberal ideas and philosophic studies, made the severity of this code appear out of proportion with the gravity of the offenses. Public opinion soon demanded a mitigation of the penal law, and this was evidenced in practice by acquittals pronounced by the jury in cases where there was no doubt of guilt. The jury was perfectly cognizant

of it, but preferred to acquit rather than to assume the inflicting of a punishment which was considered excessive, but which the jury had no way of lessening. For the same reason the jury excluded aggravating circumstances in some cases, although they had been entirely proven. The severity of the law thus resulted in impunity, according to the profound reflection of Montesquieu.<sup>1</sup>

It is true that the legislator of 1810 had learned from experience to avoid the error of the code of 1791. A maximum and a minimum had been established in general for every case when the penalties allowed it. The judge had liberty of action between these extremes, but the latitude was insufficient when the general severity of the code is considered. Besides, in the most serious penalties—death and punishment for life—it was not permitted.

The need of reform was obvious. This could be accomplished either by an entire revision of the code of 1810 or by extending the powers of the judge, allowing him to mitigate the legal punishment when the latter seemed too excessive in view of special circumstances. The last plan was considered more expeditious and practical. It further dispensed with a general revision, for which the time had not yet come. Thus arose the theory of extenuating circumstances, which has so profoundly modified, one might even say revolutionized, our penal legislation. It was the chief innovation of the law of 1832. Already, under the Restoration, a law of June 25, 1824, was one of the first steps in this direction, partially introducing the principle of extenuating circumstances in case of crimes. This latter law granted the court the right (if it thought that there were extenuating circumstances justifying a diminution of the legal punishment in favor of the culprit) to decrease the penalty below the minimum by substituting therefor an inferior penalty. But the principle was restricted to certain determined crimes (theft or wounds with qualifications, infanticide so far as the mother was concerned, etc.).

It was on the court alone, and not on the jury, that the law of 1824 conferred the recognition of extenuating circumstances, a method open to serious inconvenience in practice, apart from the objections that may be made to it in theory.<sup>2</sup> The jury remained powerless, and had no legal means of obtaining the lessening or the exclusion of the legal penalty if it considered it too excessive. Not knowing what decision the court might adopt, the jury was subjected to the same temptation of capitulating with conscience and having recourse to roundabout methods, as formerly. It still returned acquittals or systematic negations of aggravating circumstances. The law failed of its object; the reform was incomplete and imperfect. The law of 1832 enlarged and finished the system which had been timidly outlined by the law of 1824. The principle of extenuating circumstances was made general; instead of being limited to certain crimes, a general rule was enacted, governing all legislation and applicable (apart from certain restrictions) to all criminal, "correctional," and police matters. The system was further rectified by the transference in criminal matters of the declaration of extenuating circumstances to the jury. The latter was thus invested with authority to moderate the legal punishment if it seemed excessive; by the declaration of extenu-

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<sup>1</sup> *Esprit des Lois*, Book IV, chap. 13. When the punishment is beyond measure, impunity is often perforce preferable.

<sup>2</sup> The jury being the judge of the action and of the guilt, it was its logical prerogative to consider the circumstances which were connected therewith and which might lessen the guilt.

ating circumstances, this punishment was legally removed, and it was incumbent upon the court to pronounce the lesser penalty. The court had liberty, even, to lower it a second degree, if it chose to show the same indulgent spirit. The punishment of death was thus made optional for the jury in all cases when it was enacted by the law.

This generalization of the principle of extenuating circumstances permitted the legislator to escape the necessity of a complete and general revision, as well as the difficult problems which would have been aroused by this revision, either in regard to the general theories of penal legislation<sup>1</sup> (the maintenance or suppression of the death penalty, the assimilation of the attempt to the accomplished act, of complicity to the chief act, etc.) or in regard to the punishment of each special offense. The law of 1832, instead of solving these problems, preferred to leave them to the judges or juries for decision in the individual cases. But the law of 1832 did not stop at this indirect reform. It modified a number of provisions of the code of 1810. In this way the death penalty was annulled in a number of cases (counterfeiting, incendiarism, qualified theft, complicity through receipt of stolen goods). The preliminary amputation of the culprit's hand in case of parricide, branding, the iron collar, were abolished (the general confiscation of property had already been annulled by the charter of 1814), as well as the criminations established by the code of 1810 for failure to reveal certain crimes, etc.

This was the work of the law of 1832, the product and reflection of the doctrines of the eclectic school, which, after 1830, was gaining influence through some of its best known representatives—Guizot, the senior Duke of Broglie, Cousin, etc. The reform was in the direction of liberality and humanity; it was wise and practical, but it was not complete.

The republic of 1848 continued this reform (in the explosion of liberal and humanitarian sentiments which followed the revolution of February) by abolishing the public exposure of criminals. That relic of the ancient pillory had already been limited in its application by the law of 1832, especially by the suppression of the political scaffold, which was enthusiastically decreed at the suggestion of Lamartine (decision of the provisional government of February 26, 1848) and confirmed by the constitution of November 4, 1848 (article 5).

Since the death penalty was thus abolished for political crimes<sup>2</sup> a new and severer form of punishment by deportation was substituted; deportation and confinement in a fortress. This completed the distinction between the two scales of penalties in criminal matters—penalties of common law for ordinary crimes, and penalties for political crimes or those that in nature or motive resemble political offenses and are less heinous than ordinary crimes.

Finally civil death, that legacy of ancient jurisprudence, which by a sort of anachronism had been introduced into our modern codes, disappeared (law of May 31, 1854), and with it one of the last traces of the rigorous spirit of the legislation of 1810.

The second partial revision of the law, made on May 13, 1863, in

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<sup>1</sup> The law of 1832 thus virtually abrogated the provision of article 342, I. C., in regard to its platonic recommendation to juries to render their verdict without considering the penalty. They have the legal right to consider it, at least to the extent of declaring extenuating circumstances.

<sup>2</sup> Especially for crimes menacing the State, prescribed by articles 75 to 108 of the penal code, to which by general agreement this character is ascribed.

spite of its extent (no less than 65 articles of the Penal Code have been treated), is not as important as that of 1832. It does not touch general theories; the reform relates to special points. New criminalizations have been introduced, and a number of infractions which were formerly considered crimes (crimes) have been changed to the grade of misdemeanors (*délits*) and are punished by "correctional" penalties.

Its special object was to transfer the cognizance of these offenses to "correctional" tribunals, and to insure their prompt and certain punishment.

Such was the object and import of the law of 1863. Already, by its date and its tendency, differing from that of the law of 1832, it belonged to an epoch when the spirit of analysis and of positive research, applied to the natural sciences, was replacing the superficial *a priori* reasoning, and refuting the abstract dogmatism, the vague and romantic sentimentality of the preceding generation.

Finally, besides these two revisions of 1832 and 1863, which modified the legislation of 1810 but did not exceed its limits, the latter has received important additions and complements, both before the fall of the second Empire and especially since that time. The development of international relations necessitated the extension of rules in regard to the prosecution of offenses of our citizens abroad. (Law of June 27, 1866.) Special note must be taken of a whole series of laws on the question of repetition and the system of penalties.

Attention was soon called to this point by the revelations of criminal statistics. It was shown that repetitions were increasing and that the penal system of the code of 1810 was powerless to check them. Two methods were promptly suggested to remedy this condition, resulting in the formation of two rival schools. One is founded on the hope of improvement, and thinks that the remedy consists principally, if not exclusively, in changing the management of our prisons. Individual or cell imprisonment is advocated. This is called the penitentiary school or the school of imprisonment. The other is less credulous as to the corrigibility of criminals in general and as to the efficacy of cell imprisonment in particular. It thinks that, in any case, this is only a partial solution of the penal problem, and applies only to a certain class of delinquents—those who have committed but one offense, or who have accidentally committed an offense, and whose criminal tendency there is a hope of correcting. This school holds that the true solution lies in eliminating the most dangerous professionals in crime by means of exiling them into remote and sparsely settled colonies. This is the school of transportation. It will be seen that these two theories are not irreconcilable; they are even mutual complements.

They have prevailed successively in public opinion and in legislative councils. To one of these influences the different laws relative to transportation are to be attributed; that of May 30, 1854, under the second Empire, which made transportation the method of enforcing penal servitude. Thus the home land was freed from the presence of the convicts, while they were undergoing punishment as well as after their liberation, although this plan entailed an unfortunate confusion in the scale of penalties. To the same source the more recent law of May 27, 1885, is due, which extended the same measure (under the name of relegation) to a large number of delinquents. Those who repeat offenses against common law, who from the number and nature of their infractions may be considered especially incorri-

gible, are included. To the other school is due the law on cell imprisonment of June 5, 1875, which made this method the rule for prisons where short penalties are inflicted, but whose execution has unfortunately been hindered by financial difficulties; also the two recent laws, of August 14, 1885, and March 26, 1891, both proposed by M. Bérenger,<sup>1</sup> which have for object to reform the convicts and to prevent repetition of offenses. The law of August 14, 1885, introduced the plan of conditional liberation. The law of March 26, 1891, introduced the principle of conditional sentence, or delay of execution of the penalty, in case of malefactors who have committed but one offense, with full legal rehabilitation if they commit no further infraction within five years. These laws, and especially the latter, tend to introduce into our theory and practice a distinction (too little developed in previous legislation), which will probably become more and more important in the future; that between delinquents guilty of but one offense, delinquents on account of some accident or special circumstance; and habitual criminals, those who repeat offenses regularly.

It will be seen from this review of the development of our penal institutions since the beginning of the century that, although our legislation had its origin in the code of 1810, it has not remained stationary since that time. There have been constant modifications, in accordance with newly developed necessities, and the code, in terms and in form, is far from exactly representing the work of the legislator of the first Empire.

It is due to these modifications, and to the satisfaction which they have brought to the most pressing needs, that up to this time no complete revision of the code has been found indispensable; but it is also partly due to them that such revision can no longer be postponed in the interest of clearness and of homogeneity. The various provisions, differing in age and in spirit, some even scattered in special laws, must be united in a congruous whole.

We will now consider the fundamental theories of the infraction,<sup>2</sup> as represented in our present law.

#### CONCEPTION OF THE MISDEMEANOR AND GENERAL CLASSIFICATION OF OFFENSES.

Our penal code does not define misdemeanors (*délits*), nor is a definition necessary, since the penal law is a commandment which permits no doctrinal modifications. It has already been said that the code of 1810 inherited the character of revolutionary legislation. Restraint is imposed only upon those actions which threaten public order, the rights of society, or of its members; questions of pure morality and religion are left in the domain of personal liberty.

As to the legal division of offenses contained in the first article of the Penal Code, which governs all our legislation, it is only the traditional division (borrowed likewise from the codes of the Revolution) into three classes: Crimes, misdemeanors, and trespasses (*crimes, délits, et contraventions*), according to the penalty prescribed by law,

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<sup>1</sup>The second, as a just tribute, is usually called by his name.

<sup>2</sup>These theories are the special object of the preliminary provisions and of the two first books of the Penal Code, which, with a few articles in the other books and in the Code of Criminal Instruction, contain most of our penal legislation.

this penalty being an indication of the degree of culpability which the legislator attributed to the action from the social standpoint. The classification is thus in accordance with the gravity of the offense; it represents major, medium, and minor offenses.

Crimes (*crimes*) are the most serious offenses, punishable by law with criminal penalties (or those which by an obsolete terminology, criticised by Beccaria, are called "infamous")—death, penal servitude, transportation, military imprisonment, solitary confinement, banishment, and civil degradation.

Misdemeanors (*délits*) are offenses of lesser gravity, punishable by the following penalties (*dites correctionnelles*): Imprisonment for over five days, fine of over 15 francs, privation of the exercise of certain civil or family rights.

Trespasses (*contraventions*) are the least serious offenses, punishable by police court penalties—imprisonment from one to five days, fine from 1 to 15 francs.

It will be seen that the classification of offenses corresponds to that of the penalties inflicted, and also (its principal, but not its only, useful object) to the classification of the courts under whose jurisdiction the various offenses come. Crimes are tried by the court of assizes and by juries; misdemeanors are tried by tribunals designed for that purpose (*tribunaux correctionnelles et cours d'appel, composés de magistrats permanents*); trespasses are tried by justices of the peace and by police courts.

On account of its harmony with the classification of the courts, as well as its clearness, this division of offenses offers decided practical advantages, and has been adopted for a long time by the majority of foreign codes.<sup>1</sup>

Nevertheless criticisms have not been lacking, and it is fair to admit that the system, based as it is upon the degree of gravity recognized by the law in the different offenses, apart from the intrinsic merit of the cases, is necessarily artificial and conventional to a certain extent. The distinction between a crime and a misdemeanor (*crime et délit*) or between a crime and certain misdemeanors is often too slight to justify the profound difference recognized in the character of the two cases or in the treatment they receive. The same act, with the change of a single circumstance, passes from the class of misdemeanors (*délits*) to that of crimes (*crimes*), or vice versa. The legislator himself has united under the same titles the two classes of offenses, thus admitting the arbitrary character of the distinction. This explains the tendency of the most recent legislation to substitute for this tripartite division of the French code a classification based upon the nature of the unlawful act, which is thought to be more satisfactory from a scientific point of view. This is the division into misdemeanors and trespasses (*délits et contraventions*). The first comprises all actions intrinsically immoral, all intentional offenses, without regard to their degree of gravity. The second comprises unintentional offenses. This is the classification of the code of Holland, 1881, and also the Italian code of 1889; but it is doubtful if this division, besides being in its very nature uncertain and difficult, has the practical advantages of the French code. In any case, it is too little in harmony with our customs and with the condition of our courts to be soon adopted by our law. Thus the plan of reforming the code

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<sup>1</sup>Thus the German code of 1870. The Belgian code of 1867 has also retained it.

has only lengthened the term of imprisonment and increased the fine imposed by the police court. No other change has been made.<sup>1</sup>

1.—*Extent of application of the penal law—Legal element of the offense (délit).*

**NONRETROACTIVE EFFECT OF THE PENAL LAW.**

(Article 4 of the Penal Code.)

Our law, like most modern penal legislation, is based upon the principle that no act can be considered a misdemeanor (*délit*) or punished as such except by a law which recognizes it and punishes it. From the standpoint of actual equity a misdemeanor implies the existence of the penal law. This might be called the legal element of the misdemeanor, and the condition which is expressed by the well-known adage, "Nullum crimen, nulla poena sine lege."

From this principle the nonretroactive effect of the provisions of the penal law may be inferred, both in regard to the criminization itself and to the class and degree of punishment; also the limitation of its power and effect, so far as time is concerned, to the future and to those actions which are committed after its promulgation. Those which took place previously do not come under its provisions. This is the rule formulated by article 4 of the Penal Code, by the terms of which no trespass, no misdemeanor, no crime (contravention, *délit*, ou crime) can be punished by the infliction of penalties which had not been imposed by law before said offense was committed.

In the case of a new law abolishing the criminization or diminishing the penalty, there is no obstacle to the nonretroactive effect; the abolition or diminution of the penalty will benefit those offenders who have not yet been tried; they will then have the right to more favorable treatment and to mitigated punishment. This interpretation has always been sanctioned by our legislation since the Penal Code of 1791, and admitted by our jurisprudence, in spite of the silence of the code of 1810 on this point. The plan of reform of the Penal Code expressly recommends the imitation of all foreign codifications since 1867 in this respect. It can not be seen on what ground

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<sup>1</sup>It is probable that in imitation of the law of May 13, 1863, and in conformity with the tendency toward correction, which is becoming more and more marked in practice, the plan of reform will increase the sphere of trespasses (contraventions) as well as that of misdemeanors (*délits*) to include a number of actions which are now classed as crimes, especially those punished by banishment or civil degradation, which penalties have been rightfully suppressed by the plan of reform.

The adoption of the division into misdemeanors (*délits*) and infractions (contraventions) might be facilitated by the plans of judicial reform which are presented from time to time. That of 1882, in behalf of the extension of the penal authority of justices of the peace, was especially in this line. It transferred to these magistrates all unintentional offenses at the same time that intentional offenses were transferred to the jury by the court of assizes (établissement d'assises correctionnelles), as in Geneva. But this extension of the jury system to misdemeanors (*délits*) is open to grave objections. How could a regular suppression of crimes which are not so important from the standpoint of public order be maintained by a jury? Insurmountable difficulties would also result from the burden imposed upon citizens by this method. Besides, the two classes of offenses must be distinguished according to their gravity, for it seems impossible to subject all offenses, even though intentional, to the same rules, either from the standpoint of jurisdiction or from that of practice and foundation principles. Why, then, should customs and classifications that have been sanctioned by experience be changed in the interest of a theory the practicability of which is questionable?

society would continue to permit a penal sanction which, by the very act of suppressing or diminishing it, has been recognized as oppressive or useless. It appears, also, that in case of the suppression of the criminalization by the new law, the benefit of the law should apply to previous actions which would have come up for trial; that amnesty and the revocation of the sentence and its effects are virtually implied. This is the interpretation of the Italian code of 1889 (art. 3); but however just this may be, it seems inconsistent with the principles of our legislation. The latter has never made the repeal of a provision of law the reason for annulling a sentence that has previously gone into effect. Only the remedy of mercy remains, besides the sense of shame that must be aroused in the public on seeing an act punished that has ceased to come under the provisions of the penal law.<sup>1</sup>

#### TERRITORIAL AND EXTRATERRITORIAL AUTHORITY OF THE PENAL LAW.

[Articles 5 and 7 of the Code of Criminal Instruction.]

Besides the duration of the penal law, most of the recent codes, as well as the plan of the revising committee of our penal codes, consider the extent of its application to territory and to persons. Our penal legislation itself has relegated this question in regard to the conditions and the limits of public and civil action, either to the Civil Code or to the Code of Criminal Instruction.

The penal law has an essentially territorial character, which, as with police laws and those which govern general safety, makes it applicable to all those who reside in the territory, without distinction as to nationality, with the exception of the extraterritorial privilege (which it is not necessary to dwell upon here) granted to foreign ambassadors or diplomatic agents. This is a recognition of the sovereignty which belongs to each State in the bounds of its territory, and of the duty which consequently is binding upon it to maintain order and public tranquillity, to protect individuals and property. The rule is proclaimed, so far as our law is concerned, in article 3, paragraph 1, of the Civil Code; and without it, according to the interpretation accepted by jurisprudence, a sentence passed in his native country on a foreigner who is also guilty of an offense in France could prevent prosecution, but the offense having been committed in our territory, our penal jurisdiction takes precedence of all others.<sup>2</sup>

But besides this territorial authority over all offenses (*délits*) committed within our borders, our Penal Code, following a tendency which is becoming more and more pronounced in recent codes, is invested also with an extraterritorial jurisdiction for the punishment of offenses (*délits*), or certain offenses, even though they be committed in foreign countries, especially if by a citizen of France.

The development of this extraterritorial jurisdiction, recognized to-day to a greater or less extent by most of the European codes, is

<sup>1</sup>The principle of nonretroactivity is only applicable to penal laws, properly speaking, relative to criminalizations and penalties. It does not concern laws that modify jurisdictions and practice—the latter by their very nature (since they do not go to the foundation of law, but only affect the methods and procedure best adapted to bring out the truth) have a retroactive action, or are presumed to have one, without affecting the individual right of the accused, whose situation they do not aggravate.

<sup>2</sup>The plan of the commission which has the revision of the Penal Code in charge (art. 5, in fine) gives as exception to this rule only the case when the foreigner has been tried abroad on the complaint of our Government.

intimately connected with the progress of international relations, from the standpoint of finances, of commerce and industry, of ideas, etc. The increasing facility and rapidity of means of transportation and communication, besides having a tendency to efface differences of custom and civilization between nations, and to gradually unite institutions,<sup>1</sup> do not permit each State to assume an isolated position, and to refrain from the suppression of felonious (*délictueux*) actions committed abroad. Apart from the universal sentiment of justice which is interested in the punishment of attempts against mankind and civilization, no matter where they may be committed, criminality on account of the ease of communication between malefactors of different countries has a tendency to assume the character of an international danger; and to avoid this an international agreement regarding penalties is necessary.

There is a daily increasing realization of the need of mutual aid, of reciprocal cooperation, in the struggle with crime. This sentiment, which the activity of anarchists will not fail to promote, has manifested itself in the increased number of extradition treaties, empowering a country in which a crime has been committed to have the malefactor delivered up by the country to which he may have fled. The same social progress which has in the past caused the suppression of places of refuge within the land is to-day tending to the abolition of asylum rights abroad. The knowledge that immunity can not be found in flight is one of the best ways of insuring international suppression of crime. But this is not enough; the theory of extradition (not to speak of the difficulty and cost involved in its application) is incomplete. In the present condition of treaties and of international politics it is restricted both in regard to actions and to persons. For instance, it is not applicable to political offenses, and especially not to native-born citizens. According to a rule whose legitimacy is questionable, but which is established and sanctioned by all treaties and is constantly in practice, a nation does not deliver up one of her citizens, although accused of crime abroad. This restriction alone plainly indicates the necessity that the penal law of every country should be prepared to punish crimes committed abroad by her citizens, when the culprits have subsequently taken refuge in their own land; otherwise, the protection afforded the citizen by the refusal to deliver him up to foreign authority, thus practically granting immunity to the crime and to the criminal, would constitute a scandalous perversion of justice as well as a violation of international obligations. The theory of extradition should therefore be combined with the extraterritorial authority accorded the penal law in every country to judge offenses committed abroad, at least those committed by citizens. The two theories are mutually dependent. They are the two sides of the same question—the international suppression of crime—and they develop in the same ratio as other relations between the various countries.

This matter of the extraterritorial jurisdiction of the penal law which is now under consideration came up in the discussion of the Code of Criminal Instruction (whose completion and promulgation preceded that of the Penal Code) in connection with the conditions of

<sup>1</sup> This tendency toward unification is marked in the most recent penal codes, and will evidently become more so in the future, in the same proportion as civilization in Europe effaces the differences caused in the past by the varieties of climate, of customs, of the individual genius of each people, by their political and religious ideas, and by the degree and the historical development of their civilization.

exercise of public and civil rights. After much debate, the principle of extraterritorial authority was finally admitted, but as a compromise and as an exception to the idea of exclusive territorial control; the application was closely limited. Prosecution in France for crimes committed abroad was allowed only for those crimes against the safety of France, or against her credit by the counterfeiting of the seal of State, of her money or papers, or of bank notes authorized by French law. The suppression of such crimes is of vital interest to our nation; nevertheless, they often enjoy complete immunity in a foreign land. Unrestricted prosecution was authorized, not only for natives of France, but for foreigners, if the latter are arrested in France or if the French Government obtains their extradition (provided in either case that sentence has not been passed on the action abroad). For ordinary offenses (infractions) against individuals or private property prosecution is allowed only for French citizens, and for such actions as are considered crimes by our law. There were also certain reservations. Not only must no sentence have been passed upon the act abroad, and the culprit must have returned voluntarily to France, but the victim must have been of French origin, and complaint must have been brought by him or his assigns before the law could take effect, the public administration not being allowed to officially prosecute. Such was the system followed by the Code of Criminal Instruction of 1808 (original arts. 5 and 7).

The inadequacy of this narrow legislation was apparent as soon as the fall of the Empire reopened public communication between the different countries, especially on the frontiers, where the French and foreign population lived side by side and in continual contact. Under this system a French citizen was allowed on the other side of the frontier (in a village of Belgium, for instance) to commit the most serious crimes (*forfaits*); he could kill, pillage, or violate, if he were only careful to select his victims. It was enough for him to cross the frontier into France when he wished to escape. Foreign justice had no claim on him, since from his French origin he had neither extradition nor expulsion to fear, the latter as a police measure being authorized only against foreigners. French justice was also powerless, since our law punished only those crimes committed abroad in which the victim was a native of France. The same was true, and with greater reason, for simple misdemeanors (*délits*), thefts, cheating, etc., without even the necessity of distinguishing, in such case, if the victim was of French or foreign birth.

Complaints were soon made of such scandalous and demoralizing examples of immunity from punishment. The law of June 27, 1866, reforming the original articles 5 and 7 of the Code of Criminal Instruction, rectified this defect and put our legislation in harmony with the demands of justice and the development of international relations.

This law, while continuing the previous regulations in regard to crimes against the safety of the French nation or her credit, removed the double restriction by which the legislation of 1808 governed the prosecution of other crimes committed by citizens abroad, i. e., in regard to the nationality of the victim and the formalities of complaint.

The law exacts only one condition for prosecution in case of absence of sentence upon the act in the foreign country—the return of the accused to France. (This return of the culprit, with the unfortunate example of his impunity, alone seems to have given sufficient reason for his prosecution.) Until that time the culprit is not shielded from foreign justice, which has the first claim upon him. He can be fol-

lowed and caused to be delivered up by means of extradition treaties if he has fled to another foreign country. Only in our land will his nationality save him from extradition; but if his return to France places him beyond the reach of foreign justice he comes at once under our own authority, and his immunity is no longer assured, as under former legislation.

The law of 1866 not only enlarged the application of the rules for the prosecution of crime, but also extended the possibility of prosecution to simple misdemeanors (*délits*) of our natives abroad, no matter whether the offense was against the nation or an individual, and without distinction, in this latter case, as to the nationality of the victim. The prosecution is limited only by special conditions, intended to indirectly exclude offenses of slight importance, whose consideration would only encumber our bars and courts. So it is necessary, apart from the conditions exacted for crimes, that the act shall constitute a misdemeanor (*délit*) in the eyes of our law, and shall also be punishable by the legislation of the foreign country in which it has taken place and subject to penal prosecution. It is further necessary, at least for offenses against individuals, that a complaint shall be made by the offended party, or an official denunciation shall be made to the French authorities by the authorities of the country where the offense has been committed. In spite of the registered complaint, the public ministry continues to judge and to decide the advisability of prosecution, and it alone has authority to bring the case under penal jurisdiction. The law suppresses here the right of penal prosecution by means of direct summons before the tribunal, which in ordinary cases belongs to parties legally injured.

The law of 1866 thus remedied the defects of the previous legislation, so far as misdemeanors of citizens abroad were concerned.<sup>1</sup>

No innovations have been made by the said law, however, in regard to the offenses committed by foreigners. In this respect the previous provisions have been maintained; that is, prosecution is always limited to crimes against the safety and credit of the French State if the foreigner guilty of such action abroad is arrested in France, or if the French Government obtains his extradition. No action is taken against any other crime or offense of foreigners abroad, if it is committed against a French citizen and the culprit is afterwards in France. His presence does not authorize prosecution.

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<sup>1</sup>It may nevertheless be remarked that a regrettable omission has been made, which the plan of reform of the Penal Code proposes to repair, following the example of several foreign codes, especially the German code of 1870 (art. 5) and the Italian code of 1889 (art. 7). Prosecution is authorized in France only when the action has not received sentence abroad. In case of such definite sentence, and whatever the result of the prosecution may have been, whether acquittal or condemnation, prosecution no longer seemed necessary in France, since the accused had acquitted his debt toward foreign penal justice, which had the most direct interest in the matter.

But in case of condemnation the law should have required, in order that the French prisoner might be protected from prosecution on his return to France, that he should have received either punishment or pardon from the foreign government. Without these conditions the result would be that a culprit would be protected by his own condemnation (although the sentence may never have been carried into effect), the penal condemnations of foreign tribunals having no authority in France. In case of foreign condemnation it might also be in the interest of public order (following the example of the German code of 1870, art. 37, and the Italian code of 1889, art. 7, already mentioned) to reserve the right to renew the prosecution in France, to pronounce against the culprit the forfeitures and disabilities which would have been a necessary consequence of his condemnation if the same had been pronounced by French justice.

It seems that this omission is to be regretted, although the plan of reform does not touch it. Since 1866 the French law punishes crimes and offenses of our natives abroad, even against foreigners; the crimes of strangers against our countrymen should be in justice punished in the same way. President Bonjean made an eloquent speech before the Senate on this subject; but his demand was not granted. It was thought that France would not be without defense, since she could ask for prosecution from foreign governments, she could make use of the power of extradition, and in any case the right of expulsion by police. It seems also that it was feared that the authorization of judicial prosecution might occasion disputes, of a nature to arouse the susceptibility of foreign countries, jealous of the protection of their citizens, and in which (as, for instance, in England) the ancient principle of limited territorial authority is still dominant. But several recent penal laws, notably the Italian code of 1889 have shown less reserve; there is a tendency more and more marked to lower the barriers of territoriality by the extension of the extraterritorial power of the penal law, even in regard to strangers.<sup>1</sup>

## II.—*The attempt—Element of the offense.*

(Arts. 2 and 3 of the Penal Code.)

The offense (*délit*), apart from its legal character, has another element—the recognition of an illegal action.

When does this element of the offense come into existence? At what moment is criminality born, in the eyes of the law, during the successive stages which intervene between the first conception of the crime and its actual execution by the agent? This is the question considered under the above heading.

The theory of the attempt appears in our Penal Code, in articles 2 and 3, whose provisions have been borrowed from a law of the intermediate epoch, of Prairial the 22d, year IV (ninth month of the calendar of the first French Republic, from May 20 to June 18). The Penal Code of 1791 does not include general provisions on this subject; it merely punishes the accomplished offense (*infraction*), or if the attempt is punished it is only occasionally, for assassination and poisoning. The law of Prairial 22, year IV, remedies this omission by generalizing the punishment of attempts to commit crime (*crime*), and defines the character of the latter. Another law of Frimaire 25, year VIII, article 17, extends the same principle to certain misdemeanors (*délits*). The provisions of these laws constitute articles 2 and 3 of the Penal Code.

These articles recognize and punish as of the same nature as the crime or offense an attempt which shows an intention to carry out a purpose, and which has been suspended or which has failed of execution only through circumstances independent of the will of the agent.

Nevertheless, the attempt thus defined is punished in a general way only when it is a question of crime. In misdemeanors (*délits*), because of their lesser gravity, the attempt is only occasionally punished. Attempts at trespasses (*contraventions*), on account of their lack of importance, are not punished; neither is complicity in them recognized.

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<sup>1</sup> See articles 4 to 7 of the Italian Code of 1889. They admit the possibility of prosecution in Italy, under certain conditions, of all offenses (*délits*) committed by foreigners abroad either against the State or against an Italian individual, or even, sometimes, against another foreigner.

Our law includes under the name of attempt, and submits to the same regulations, the attempt properly speaking, or the beginning of an action which is suspended or lacks completion; and the offense (*délit*) which fails, or in which the execution fails of effect. This second case is in the eyes of the law only an attempt completed, as it was formerly called, in opposition to the attempt strictly speaking.

In both cases the attempt is manifested by action. It presupposes that the execution has been at least begun. Not only does the law not touch the intention or the criminal resolution, however culpable the latter may be from the standpoint of morality; but it also does not affect actions outside of those which concern the execution by which the criminal resolution may have betrayed itself; actions manifesting the intention to commit the offense; actions preparatory to the executions, such as the purchase of arms or an instrument in view of the offense to be committed, and such other actions which are accessory to the offense, but which were not actual parts of its execution. These acts may be punished as separate misdemeanors, because of the alarm and trouble which they can occasion in society. These acts may also, if the meditated offense is accomplished, constitute complicity which may be ascribed to another person, and so punished.

It was considered good policy not to ascribe penal responsibility too early, otherwise the malefactor would have a certain interest in persevering to the end in his criminal enterprise.

This same motive of social interest causes the law to go even further; the very attempt, up to the actual performance of the offense, is acquitted, if the will of the agent is responsible for its suspension or failure.

The attempt, when combining the conditions necessary to be punishable, is placed in the same category with the crime or misdemeanor (*crime ou délit*) and punished by the same penalty as the accomplished act. Our law has been criticised in this respect, and is not in accord with the legislation of most foreign countries, especially those having adopted recent laws, which impose a less serious penalty for the attempt than for the accomplished offense.<sup>1</sup> To justify this assimilation of the attempt with the crime, it is said that the attempt being punished only when circumstances independent of the will of the agent are responsible for the suspension or failure of the deed, the agent is as guilty as if the crime had been accomplished. He has done all in his power to commit it.

Treilhard made this remark in the debate on the code of 1810, and M. Garafalo approved it, at least as far as the failure to commit the crime was concerned, an indication of the general tendency of the anthropological school of Italy to be less occupied with the crime than with the criminal and the moral perversion manifested by the offense.<sup>2</sup> The above observation, which applies exactly only to the offense that has failed of execution and not to the attempt itself, makes the mistake of leaving out other elements which should be taken into consideration in deciding the penalty (apart from the personal guilt of the delinquent), viz., the general reactions caused in society by the offense,

<sup>1</sup> Some, like the Portuguese code of 1886 (arts. 104-105) and the Italian code of 1889 (arts. 61, 62) even distinguish two classes of attempt, and have enacted three degrees of punishment: for the crime attempted, or the simple attempt; for the crime which has failed of execution, and finally for the accomplished crime. This complicated plan seems to me impracticable.

<sup>2</sup> See Bulletin de l'Union Internationale de Droit Pénal, 4th vol., p. 99.

which find expression in the punishment. Without speaking of its effect on the third party, from the point of view of the example offered (a point too much neglected by the anthropological school, which is interested only in the malefactor himself), the penalty has also for its object to satisfy outraged public sentiment. In short, it is a reparation to the victim and is also meant by the intervention of the social power and by the public punishment inflicted upon the culprit to anticipate the exercise of private vengeance. It is obvious that the two elements in the determination of the penalty (and especially the latter) have not the same importance in the case of the attempt and in that of the accomplished offense. Our legislation is thus wrong in assimilating the two cases, and the plan of reform is right in its intention to alter the matter, and impose in future a less serious penalty for the attempt than for the crime itself. (Arts. 83 and 84 of the plan.) A similar proposition was made in the debate on the law of revision of April 28, 1832. It was waived, not because the criticism of the code of 1810 was not admitted to be well founded, but because it was thought that the new theory of extenuating circumstances, through the latitude which it conferred upon the judge, would correct in practice the excessive severity of the law.

### III.—*Penal responsibility and causes which exclude or extenuate it.*

#### JUSTIFYING CAUSES, OR CAUSES OF IRRESPONSIBILITY.

(Arts. 64–69, 327–329, of the Penal Code.)

This is the third essential element of the misdemeanor (*délit*), besides its legal and its material elements. It does not suffice that there should have been violation of the penal law. It is necessary, before an action can be recognized as a punishable offense, that it should be the work of an agent who is responsible—that is to say, one endowed with intelligence and liberty. Our legislation and that of all other countries, even the most recently enacted, take this attitude; it is based upon the traditional idea of free will. It is well known what attacks have been made upon the theory of free will in our days by the various schools of determinism and positivism, and recently from the anthropological school of Italy. All these schools see in human actions only phenomena subject, like those of nature, to the laws of a universal determinism. They declare that the idea of free will is an illusion founded upon ignorance of the motives of our own actions. It can not be affirmed that the old argument of free will has issued entirely unimpaired from these attacks.

The atmosphere of our age weakens the firmest convictions. Even those (there are fortunately still a number) who remain faithful to the idea of moral liberty no longer seem to give it the same character as formerly; the sphere of this liberty is more and more restricted. Without accepting all the theories of the Lombrosian school, or even of fatalistic schools in general, people are beginning to realize that in human actions and in the genesis of crime other things must be considered besides free will. One must place beside the latter the influences of environment, of heredity, of temperament, of climate; and these are difficult to determine. It can not be denied that the moral sense is lacking in a large number of criminals, so that for this minority at least responsibility is only a fictitious term, a conception im-

posed by the necessity for social protection. Especially does it seem impossible to admit the absolute distinction, so readily defined by old metaphysical theories, between reason and insanity, between responsibility and irresponsibility; the two are connected by a series of impalpable gradations. Should another step be taken? Should it be admitted that the idea of liberty, thus encroached upon, is destined to disappear? This is the ground taken by its enemies, who do not hesitate to call it an obsolete prejudice. This is perhaps too radical treatment of an idea so old, so profoundly rooted in human conscience (the great argument from the spiritual standpoint), and apart from which it seems difficult to establish penal responsibility.

In any case, this responsibility, the product of moral liberty, is one of the edicts of our penal legislation. So the code confines itself to recognizing such exceptional causes as may exclude this idea of responsibility, by the absence of the intelligence or the liberty which constitute its two elements. That is, it recognizes alienation or alteration of the mental faculties; the presence of constraint or superior force, physical or moral, and lack of discernment due to youth. These are the three principal reasons which exclude penal responsibility, as provided by articles 64 and 66.

As to the first two the legislator maintained a wisely conservative attitude. He contented himself with formulating the principle that there was neither crime nor misdemeanor (*crime ou délit*) if the accused was in an insane condition at the time of the act, or was constrained by a force which he could not resist. (Art. 64.) He refrained from defining insanity or constraint, thinking that any legal limitations on this subject would be a mistake and would result in hampering the judge in a matter which belonged exclusively to his domain. The violence done to the inner convictions of the judge might have resulted in resuscitating the inconveniences of the old system of legal proofs.

It is enough to say that the terms "insanity" and "constraint" should be taken in the broadest sense, and understood as capable of including all causes which might have produced the absence of intelligence or liberty in the agent; not only the varieties of mental alienation, but the obliteration of the faculties resultant upon idiocy and all physiological or moral conditions which may end in temporary insanity; transitory delirium consequent upon certain maladies, hypnotic influence or suggestion, somnambulism, etc., as well as every impulse, either physical or moral, under the influence of which the act was committed, whatever may have been its nature or its cause, natural danger, menace of death, instinct of preservation, extreme distress or misery, etc.

All these conditions could and should be included in the application of article 64.

It is only to be regretted, in the interest of public safety, that the law, in case of acquittal on account of insanity, did not make a similar provision to that by which (art. 66) the minor who is acquitted as having acted without discernment is placed under restraint. The court or tribunal should have been authorized to place the accused in an asylum.

The plan of revision of the code fortunately has such a provision. (Art. 55.)

The question of penal minority and the lack of discernment should be made the subject of a special study; so we will not consider it here.

The last two reasons for penal irresponsibility are when an act is constrained by law and a subject of legitimate defense. (Arts. 327-329 of the Penal Code.)

There is in both cases a superior moral necessity which the agent has obeyed and which can be considered a constraint. Not only does a constraint exist which debars the idea of liberty and personal culpability in the agent, but the criminality of the act is not admitted; there is a justifying cause, as it were. The act is legalized, justified, because there has been on the part of the agent nothing more than the fulfillment of a duty, the exercise of a right.

The law here again sanctions the theory of legitimate defense, depending upon the opinion of the judge in each individual case for the determination of its conditions and its limitations. The latter point by its very nature escapes the provisions of the law.

Nevertheless, by a provision intended to closely guard the safety of the domicile and of persons, the law establishes a presumption of legitimate defense in the two following cases: (1) If the act is committed at night while repelling the scaling or the breaking open of walls, fences, or entrances to an inhabited house or apartment or any appendage thereof.<sup>1</sup> (2) If the act takes place while defending oneself, whether by night or day, against the authors of theft or pillage committed with violence.

Finally, apart from the causes excluding penal responsibility and punishment, now under consideration, the same result is sometimes ascribed by the law to certain special circumstances expressly provided for. The latter do not exclude guilt, as is done for reasons of nonimputability and justifying reasons. The admission of guilt is even necessary, but it is redeemed from a legal standpoint; the agent, although recognized as guilty, is exempted from condemnation and punishment. The effect of these special circumstances thus resembles that of justifying reasons. Instead of an acquittal, strictly speaking, they entail an acquittal of an inferior order, called in our law an "absolution;" from the same source comes the expression "absolving excuses." As an instance of these excuses (which necessitate a special provision), there is the one established by articles 108, 138, and 144, in case of crime against the safety or the credit of the State (such as counterfeiting), in which provision is made for that culprit who denounces the crime to justice before prosecution has begun, or who has been of service afterwards in arresting the co-authors or accomplices. The law, in recompense for the service thus rendered to society, exempts the culprit from the penalty incurred by his own participation in the crime, at least from the principal penalty; the accessory penalty of prohibition of residence is reserved.

This provision (whose morality is doubtful) thus offers an inducement to denunciation. It is thought that such action is justified by the importance of suppressing this sort of crimes, both on account of the necessity of maintaining the existence and the credit of the State and because of the difficulties which attend their discovery and suppression.

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<sup>1</sup>This provision has an imposing and curious genealogy; precedents may be found in various legislations as far back as the most ancient. Hebrew Law (Ex. XXII, 2 and 3); Law of Solon; Law of the Twelve Tables; Law 4, Digest ad legem Aquilium; Barbarian Laws; Middle Age Customs, etc. All give examples of analogous provisions, inspired by the same motive and the same idea of protecting the inviolability of the home, especially during the night.

## REASONS FOR EXTENUATION—EXTENUATING EXCUSES AND CIRCUMSTANCES.

(Arts. 321-326 and art. 463 of the Penal Code.)

Penal responsibility and the criminality of an act vary or may have degrees according to the individual and the case. The greater or less development of intelligence or liberty in the agent, the motive for and the special circumstances attending the act, must be taken into consideration.

To these variations of responsibility and of criminality corresponds the double theory of reasons which extenuate and reasons which aggravate the penal responsibility and the penalty. I will speak of the latter hereafter; at present I will consider only extenuating causes.

They exist in our legislation in two classes—those determined by the law itself and connected with circumstances recognized thereby (these are legal excuses, properly speaking—simple or extenuating excuses to distinguish them from the absolving excuses mentioned above), and those which are left to the decision of the jury or judge in each case. The latter are strictly extenuating circumstances.

*Legal excuses, properly speaking.*—Our law has not given to this theory the breadth which is permitted by several recent legislations, especially by the Italian code of 1889. The latter admits and recognizes under this title as many causes of semiresponsibility as of total irresponsibility. Each cause of penal irresponsibility has thus an excuse which corresponds thereto and acts as a diminutive; for instance, besides insanity and constraint, which exclude the responsibility and the penalty, a semiinsanity and a semiconstraint, involving a legal diminution of the punishment are admitted.<sup>1</sup>

It must be admitted that this is consistent with the admission of the fact that many gradations actually exist between normal responsibility and its entire absence. It is also in entire accord with the spirit of the Italian code and with its general tendency to broaden as much as possible the sphere of legislative provision and to make the law, in its valuation of the different elements of criminality and in the allotment of the punishment, applicable to all conditions that could reasonably be foreseen. Our code does not claim such prescience. Besides several special excuses, it actually establishes only two classes of general excuses; minority, in favor of the minor who is condemned as having acted with discernment and provocation, in the case of homicide, by blows or wounds (arts. 321, 326, of the Penal Code), when the homicide and the blows or wounds have been occasioned by unjust provocation. The law, even when the circumstances would not have sufficed to preclude the idea of responsibility in the agent, by causing a constraint which prevents liberty, or by placing him in a position where defense is legitimate, takes into account the natural and unthinking anger which was occasioned by the provocation, and which, if it did not preclude, at least lessened his liberty; and on this account a large diminution of punishment is granted the prisoner. This excuse of provocation is, in short, the substitute for and the diminution of that of constraint or of legitimate defense. Our code, without speaking of its limitation to homicide and to blows and wounds, does not sanction it in as broad terms as many foreign

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<sup>1</sup> See article 44 and following of the Italian code.

legislations; for instance, the German and Italian codes (sec. 213 of the first and art. 51 of the second), which in principle make it result from unjust provocation of whatever nature.

Our code admits it only in restricted terms and for certain determined cases: (1) When the act has been provoked by blows or serious violence against the person, which implies assault, actual or corporal violence, and excludes provocation resulting from simple offenses, from defamation or moral outrages in words or writing, or from insulting or vexatious procedures, although in reality there might be in the latter a cause for anger and a provocation as powerful or more powerful than in the case of blows or physical violence; <sup>1</sup>(2) when the act takes place in repelling during the day the scaling or breaking of the fences, walls, or entrances of a house or an inhabited apartment or their appendages; (3) when, in case of flagrant adultery on the part of the wife in their common dwelling, murder is committed by the husband, either upon the wife or her accomplice; <sup>2</sup>(4) in case of the crime of castration provoked by an outrage which violates modesty, which is in effect only a particular application of the first-named case. In these cases the excuse of provocation is admitted by the law; it would have been better to generalize the principle.

*Extenuating circumstances.*—There is a marked distinction between excuses which are obligatory upon the judge (the latter can admit only such conditions as are recognized by the law, nor can he refuse to admit them, according to article 65 of the Penal Code and article 339 of the Code of Criminal Instruction) and extenuating circumstances. The latter are essentially uncertain and optional; they are dependent upon the free and absolute opinion of the judge, who has entire power to recognize their existence or not (article 463 of the Penal Code and 341 of the Code of Criminal Instruction).

I have already considered, apropos of the revision of the law of April 28, 1832, of which it constitutes the principal innovation, the sources of this theory of extenuating circumstances and the important part that it has taken in the evolution of our penal institutions. But aside from the occasional utility which it presents from the standpoint

<sup>1</sup>The law doubtless feared, in extending to this hypothesis the excuse of provocation, to create for the outraged person, on account of the excuse accorded him, a temptation to yield too readily to anger. But the exclusion of the excuse, besides ignoring the truth of the facts, multiplies the acquittals, of whose number complaint has often been made, in instances occasioned by passion—"passionnelles." These acquittals could sometimes, though not always, be avoided if the jury had at its command the excuse of provocation instead of being forced to choose between an entire acquittal and a condemnation mitigated only by extenuating circumstances. From this point of view alone it would be well to generalize the principle of the excuse of provocation, as well as, in order to avoid the indirect procedures to which in practice it is often necessary to have recourse, to supply the lack of this excuse, notably the extra-legal method of bringing offenses under correctional tribunals, by excluding aggravating circumstances which have been entirely proven; for instance, intention to inflict death, in the matter of homicide, and blows and wounds.

<sup>2</sup>The law again, by an unjustifiable distinction, limits the application of the excuse to the husband. It is not granted to the wife in case of murder committed by her upon the husband or his accomplice. But it may be noted that this excuse in favor of the outraged husband—an excuse that is simply extenuating—is rarely applied in practice, its admission being subjected to countless restrictions; for instance, the act must be flagrant and must be committed in the common dwelling. Besides, the jury, going further than the law, and exercising its sovereign right to decide the question of guilt, usually wholly acquits in this case; which removes the necessity for the excuse, since all excuses are only useful to mitigate the penalty after guilt is admitted.

of reforming old legislation, the theory of extenuating circumstances answers a permanent necessity of penal legislation. It constitutes a mean between two extremes—the arbitrary power of the judge, as in the old law, and the inflexible determination of the penalty by the law, as in the code of 1791. This is a correction necessary to the legal classification of the penalty. The legislator, when he decides the punishment, can take into consideration only criminality in general, apart from the criminal act, considered in itself and under ordinary circumstances. He can have no regard to the special circumstances which modify this abstract criminality; the judge alone is in a position to realize and take account of them. Hence the necessity of allowing him liberty, in deciding the degree of punishment, to choose between two fairly remote conditions. This necessity is met by the theory of extenuating circumstances; they act as an indispensable complement to the system of legal excuses and as a corrective to the inflexibility of penalties which have neither maximum nor minimum, such as the penalty of death.

The principle of extenuating circumstances since 1852 dominates all our legislation. It is applicable to all matters that pertain to justice (with the exception of some restrictions for infractions provided for by special laws outside of the Penal Code)<sup>1</sup> without distinction as to the nature of the infractions, either for the original offense or for repetitions.

The question of extenuating circumstances is left entirely to the judge, who is not even obliged to give his reasons for admitting them. They are not indissolubly connected with any particular detail, but with the ensemble of the case; with the general impression made upon the mind of the judge or jury by the arguments. It would be contradictory to this idea to oblige the judge to give the reasons for his decision, as well as to limit the field of extenuating circumstances and determine them legally. The attempts in this direction that have been made by foreign laws (Austrian, Spanish, and Portuguese codes, for instance) have not been, as a rule, satisfactory. The Italian code, in spite of its tendency to restrict the powers of the judge and to extend the sphere of legislative provision, and regardless of the precedents of the Tuscan code of 1853, has finally been forced to realize the futility of such an effort and to adopt the system of the French law in this respect.<sup>2</sup>

The admission of extenuating circumstances in criminal matters belongs to the jury. (Art. 341 of the Code of Criminal Instruction.) The legislature of 1832 rectified on this point the system of the law of 1824, by which such admission was reserved to the court. The present plan, besides being practicable, has the advantage of being in conformity with the division of prerogatives between the court and the jury. The jury, which decides as to culpability, must also judge all circumstances which are connected therewith, and may modify it, which, in the case of extenuating circumstances, has the same effect as excuses. The opposite interpretation, adopted by the Belgian law of October 4, 1867, which followed the example of our law of 1824 and left

<sup>1</sup> Misdemeanors and trespasses (*délits et contraventions*) admit extenuating circumstances only when the law authorizes their admission by an express provision, or by reference to article 463 of the Penal Code. The majority of the laws have such measures.

<sup>2</sup> Article 59 of the Italian code, which sanctions the principle of extenuating circumstances in general, only making the extenuation less broad than in our law.

this declaration to the court,<sup>1</sup> finds its explanation in the fear of granting the jury too much freedom. It is open to criticism on the ground of logic, apart from the fact that it risks involving extra legal complications, of which I spoke at the beginning of this subject. It is this dread that the jury may prove too indulgent that decided our legislature to subject the admission of extenuating circumstances to the express condition of a majority in their favor. (Art. 347 of the Code of Criminal Instruction.) This is an exception to the general rule enacted in the same article, requiring a majority only against the accused. This last rule is applicable to excuses, the latter being of a limited nature and resulting only from conditions recognized by the law. The jury does not have the liberty and the unlimited power, in this respect, that it has in regard to extenuating circumstances.

The general effect of extenuating circumstances is to cause a modification of the penalty. But the extent as well as the nature of this extenuation differs according to the case.

When extenuating circumstances are cited for offenses which do not belong to the class of crimes (crimes) the judge has unlimited power to mitigate the sentence; whatever may be the penalty, he can (even when the offense has been repeated) indefinitely reduce it; he can also decrease the general minimum of imprisonment and fine (6 days and 16 francs) to the minimum of police-court penalties (1 day and 1 franc); in cases where the law ordains at the same time imprisonment and fine he can impose one of these penalties, and if the law enacts imprisonment he can convert it into a fine. (Art. 463, last paragraph.) It will be seen that the system of extenuating circumstances adopted by our law borders here upon the entire suppression of the minimum, as in the code of Holland of 1881, the penalty being legally fixed only so far as its maximum is concerned. This unlimited power of extenuation finds its explanation in the imperfections of certain parts of the Penal Code and in the general severity of the penalties for "correctional" matters, as well as in the essential differences in the criminality of "correctional" offenses in the various cases. Naturally this power was thought excessive by some; it may have resembled a return to the system of arbitrary decisions on the side of indulgence. The law of May 13, 1863, influenced by this sentiment, introduced a modification which limited in some respects these powers of the "correctional" judge. This modification was repealed by a decree of the provisional government of November 27, 1870, which reestablished the system of 1832. Another proposition in the same line (made during the discussion of the recent law of March 26, 1891, in regard to the diminution and aggravation of penalties), having for its object a general restriction of the effect of extenuating circumstances in case of repetition, was not accepted. The Chambers rejected it and retained in its full scope the theory of extenuating circumstances.<sup>2</sup>

<sup>1</sup>This same law, differing from our own, has granted also to jurisdictions of instruction the right to admit in advance the existence of excuses and of extenuating circumstances, when it may result in subjecting the penalty and prosecution to correctional jurisdiction. This is an expedient to regulate this latter practice, which the necessity of repression has made to enter so deeply into legal customs.

<sup>2</sup>The plan of the committee on revision of the Penal Code revives this proposition. Except this general restriction of the effect of extenuating circumstances in case of repetition, and also with the exception of the differences resulting from the changes introduced into the scale of penalties, the plan reproduces and preserves in its spirit and in its general features the theory of extenuating circumstances as it exists in our present law.

This unlimited power of diminution, connected with extenuating circumstances, is only applicable to "correctional" matters.

In criminal cases the diminution, although still capable of considerable application, is, nevertheless, limited. The penalty, even when lowered two degrees, can not be less than one year in prison. The minimum is made two years, if the penalty incurred is that of penal servitude. (Art. 263, 6°.)

This restriction imposed upon the judge in the matter of modifying the penalty in criminal matters has been criticised more than once. It has been proposed to create, besides the system of extenuating circumstances as now organized, a new degree of diminution in regard to circumstances which by their nature are very extenuating, according to the example set by the code of Geneva, of 1874. This would involve a greater decrease of the penalty than is granted for ordinary extenuating circumstances. Such a proposition was made to the Senate in 1885, but rejected, and not without reason. The object of its author, M. Bozérain, was to avoid, by the additional power to decrease the penalty, the acquittals rendered by the jury in affairs called those of passion—"passionnelles." It is doubtful if this object would have been attained; in any case the remedy would have been worse than the disease. The theory of very extenuating circumstances would have been too easily available, and under the pretext of moderating the penalty a veritable degradation of the latter would have resulted in criminal matters. This prospect of an unlimited, or practically unlimited, reduction of the punishment would have incurred the risk of causing the provisions of the penal law to lose their efficacy from the standpoint of intimidation and preventive effect. This is the criticism offered, not to mention the option of the total suppression of the minimum which it implies, which objection, in my opinion, can be made to the system of the Holland code of 1881. The adoption of the theory of very extenuating circumstances would have had the same result, with the further danger which the jurisdiction of the jury would occasion, which does not exist in Holland.

#### PLURALITY OF MISDEMEANORS OR OF AGENTS—COMPLICITY AND ACCOMPLICES.

(Arts. 59-63 of the Penal Code.)

So far as establishing a distinction between agents according to the part in the offense they have taken is concerned, our system is simple, and, in spite of criticism, we think it rational, and the only one which can be in harmony with actual law, which considers not the mere criminal intention, but the executed resolution manifested in the act. Our law places the responsibility of the misdemeanor (*délit*) or the attempt, primarily and directly, upon the person or the persons whose participation is shown by acts which in themselves suffice to constitute the punishable misdemeanor (*délit*) or attempt. The law regards such person or persons as the principal agents of the misdeed. They are the authors, strictly speaking, or the co-authors.

But apart from these, other agents may also have taken part in the infraction in a manner that is more remote and indirect. Their actions may not have been those concerned in the execution of the deed; they did not constitute the infraction, but they nevertheless par-

ticipated therein, for instance, by means of persuasion or provocation to commit the infraction; by means of instruction, and, in general, by intellectual or material assistance of a nature to facilitate the execution of the offense without actually constituting it.<sup>1</sup>

If these actions were isolated they would escape, at least in principle, from the scope of the penal law; but they become punishable because of their connection with the infraction when the latter has been committed. They then partake of the criminal nature of the same. It must be concluded that complicity can not exist, strictly speaking, except through the knowledge on the part of the accomplice of the contemplated crime or offense, and through his intention to take part in the same. It is also necessary before complicity can be punishable that a crime or misdemeanor (*délit*) should exist; that is to say, a primary act punishable in itself. Not that the principal agent should be necessarily punished or prosecuted; he may escape both prosecution and penalty by means of some special circumstance (if he is unknown, for instance, or deceased, or if he enters into the hypothesis of art. 380 of the Penal Code). But this impunity can not profit the living accomplice who is known and who, in full possession of intelligence and liberty, has acted under conditions which make him liable to penal prosecution.

Besides, our law does not consider any form of indirect participation as complicity. Such a general incrimination might give opportunity to dangerous processes and to arbitrary decisions. The law (arts. 60-61, 62) decided exactly what circumstances constituted complicity. This is another instance of the application of the fundamental maxim, "Nullum crimen, nulla poena sine lege." It applies to the guilt of accessory actions, as well as to that of crimes and offenses. (See enumeration of cases of complicity in arts. 60, 61, and 62 of the Penal Code.)

Two important points may be noted in these provisions:

1. The provoker or instigator, although he may be only an accomplice in the eyes of our law,<sup>2</sup> not having actually taken part in the execution of the offense, is, nevertheless, from the intellectual standpoint, the true author of the act, since he was its primary initiator and its promoter. Several foreign legislations, leaving the example of our code on this point (especially the Belgian code of 1867), have not hesitated to compare him to the principal agent, and to treat him as the actual author, the intellectual author, on the same level with the material author or authors. Other codes, such as the Italian code of 1889 (a singularly complicated system), without going so far, assign to the provoker or instigator a distinct place apart from the authors, properly speaking, and the simple accomplices. (Art. 63 and following of this code.)

2. Unfortunately our code did not restrict its provisions to the ordinary complicity mentioned in article 60. It admitted, besides the

<sup>1</sup> It can not be denied that in the case of assistance to the infraction the distinction between actions accessory to the execution and those constituting the execution itself (or between the accomplice and the co-author) is often very delicate in practice. Jurisprudence, too, has a tendency to assimilate the two situations, and to see in these accessory actions an actual cooperation, and in the agent thereof a co-author. The authors of the plan for revising the Penal Code show the same tendency, which I think is wrong.

<sup>2</sup> As to complicity through provocation, article 60 of our Penal Code must be completed by article 23 of the law on the press of July 29, 1881.

latter, in the two articles that followed, two other classes of complicity of a special and exceptional character, and which are harder to justify.

1. Complicity on account of sheltering malefactors (art. 61) is attributed to "those who, knowing the criminal conduct of malefactors committing depredations or violence against the safety of the State, the public peace, individuals, or property, furnish them habitually with lodging, place of retreat, or of meeting." This is explained by certain circumstances contemporaneous to the drawing up of the code of 1810. On account of the political troubles which had disturbed France for twenty years, bands of brigands (garotteurs, chauf-feurs) were allowed to pillage the country. The code determined to put an end to their exploits by enacting rigorous measures against those who had been giving them shelter—a somewhat superfluous severity, in view of the provisions against the associations of malefactors contained in the special part of the Penal Code. (Art. 265-268, revised by the law of Dec. 18, 1893.)

2. Complicity on account of receiving articles which are the result of a crime or infraction (art. 62) is ascribed to "Those who have willingly received all or part of the articles taken, appropriated, or obtained through a crime or misdemeanor." Here again the law was guided by a practical consideration. It was thought that the best way to discourage theft and thieves was to close the outlets of their industry by aiming a blow at the receivers. It is considered that the latter, by taking such action, make themselves accomplices of the offense. Instead of admitting this sort of retroactive complicity, it would have been better if the law made the receipt of articles resulting from a misdemeanor a distinct offense, and assigned thereto a special punishment, as most recent foreign legislations have done, and as our law itself does in analogous cases—the receiving of the corpse of a murdered person (art. 359), the receiving of a criminal pursued by justice (art. 248), etc.<sup>1</sup>

Complicity thus characterized is punished by our law as a crime or a misdemeanor (crime ou délit) or an attempt at a crime or misdemeanor. In case of trespasses (contraventions) the law punishes neither the complicity nor the attempt on account of their slight importance.

As to the punishment allotted to accomplices, it will be seen that since our law attributes what might be called a borrowed guilt to complicity, the penalty can be decided only in connection with that imposed for the offense. But our code goes beyond this, and punishes the accomplice in the same manner as the principal agent; the same penalty is enacted against crimes or misdemeanors (crimes ou délit) and against complicity and accomplices. The punishment (regulated according to the nature of the crime or offense, with the various circumstances which are connected therewith and which modify the intrinsic culpability) is declared by the law to be the same for all agents, without distinction as to whether they are the authors strictly speaking or the accomplices, and without considering the degree of their participation in the offense; modifications of the penalty are allowed only when aggravating or extenuating causes alter the individual guilt, such as repetition, minority, extenuating circumstances, etc.

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<sup>1</sup>The plan of revision of the Penal Code suppresses this instance of complicity and the preceding one, only recognizing the ordinary complicity of article 60.

This rule is justly criticised by the majority of writers on criminal law. Although our system has on its side the traditions and precedents of Roman law, of ancient jurisprudence, and of subsequent legislation, it has been less and less followed by recent foreign penal codes, almost all of which enact against complicity or accomplices a penalty calculated upon that for the crime or misdemeanor (crime ou délit), but inferior to the same (except in the case of complicity on account of provocation). The Belgian, German, Dutch, and Italian laws especially take this standpoint,<sup>1</sup> and it is certainly preferable to our own. On the one hand it is more in harmony with truth and justice, because, although derived from and dependent upon the guilt of the principal action, the guilt of accessory actions is not equal thereto; authors and accomplices have both taken part in the offense, but their participation is of a different nature. For the author, it is direct and immediate, manifested by actions which enter into the execution of the offense; for the accomplice, it is subsidiary and secondary, indirect in any case, limited to actions which are merely preparatory and which in themselves could not have constituted the misdemeanor (délit) and the culpability. There is a distinct difference, so far as the guilt is concerned, which should be indicated by a difference in the punishment. On the other hand, the provision of foreign codes is more directly founded upon social interest and good policy. By making the penalty uniform and thus equalizing in advance the penal risk for all the agents of the offense, without respect to the degree of their participation, our legislation has a tendency (as remarked by Beccaria toward the end of the last century) to promote union among criminals and to prevent disputes as to the respective parts to be taken in the infraction.

Our law in this respect is open to criticism, although it is but fair to admit that since 1832 its severity and disadvantages have been to a great extent corrected or removed, at least so far as ordinary complicity is concerned, thanks to the theory of extenuating circumstances.

Its simplicity has at the same time the advantage of evading the serious difficulty presented by the necessity of distinguishing between principal actions and accessory actions. It was doubtless these considerations that influenced the authors of the plan of revision of the Penal Code, and led them to retain on this point the provisions of the code.

The Penal Code does not limit this rule assimilating complicity with the crime or offense, in the apportionment of penalties, to the ordinary complicity of article 60; it is extended also to complicity on account of receiving stolen goods, which is mentioned in the following articles; and even to the subsequent complicity on account of receiving articles accruing from a crime or offense, despite the exceptional nature of this complicity, and although the guilt of the complicity may be in excessive disproportion to that of the crime or offense. Notwithstanding these considerations, the code of 1810 barely admitted (art. 63) a slight amelioration of the severity of the principle.

When the crime was of a nature to entail death or punishment for life, this penalty was changed into penal servitude for a time in favor of the accomplice who receives such articles, if it has not been proven

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<sup>1</sup>See Belgian code of 1867, art. 69; German code of 1870, arts. 48, 49; Dutch code of 1881, art. 49; Italian code of 1889, arts. 63, 64.

that he had special knowledge, at the time of receiving the goods, of aggravating circumstances<sup>1</sup> which would make his action liable to the penalty of death or perpetual punishment.

If this were once proven, the rigor of the rule was maintained, and the receiver of the goods was liable to whatever penalty might be enacted for the crime, even to death. The law of 1832 corrected this too severe provision by not admitting the penalty of death against the receiver, but it maintained (except in the case of extenuating circumstances) the rigorous provision of the code of 1810 as to the punishment of this case of complicity.

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<sup>1</sup>The exceptional provision of article 63 in regard to the accomplice who receives stolen goods, has for a result that as a general rule and for all other cases of complicity, our law does not exact the special knowledge, in the accomplice, of circumstances which aggravate the act or the offense, in order to make him liable for the consequent increase of the penalty. It considers the knowledge of the crime or infraction in itself, apart from these circumstances, enough. These circumstances are regarded as the natural sequel of the offense, which the accomplice could and should have foreseen from the moment that he associated himself in the offense. The person who has given the order to inflict blows or wounds should have foreseen the death or the permanent injuries which might ensue; the person who gave information which led to the successful commission of a theft, virtually assumes the responsibility of the means employed (scaling, breaking open, etc.) as well as the personal violence which may have been a necessary incident of the theft. This is the view taken by our law. It can not be denied that it is severe and open to criticism from the standpoint of the theory of complicity. The latter is founded on the knowledge of the crime or misdemeanor (*délit*) on the part of the accomplice; it can actually exist only in the measure of this knowledge; a man can not be an accomplice of something of which he is ignorant. It seems, then, logically as well as in equity, that the effect of aggravating circumstances should be limited so far as the accomplice is concerned, to the knowledge of these circumstances. Such is the view of the Italian code of 1889 (art. 66).

The plan of reform of the Penal Code does not take an explicit position on this point, nor on the question (much debated in practice) as to the effect of aggravating circumstances which are specially concerned in the character of the agent (as the case of a murder committed by the son or descendant of the victim, which transforms the murder into parricide; that of a theft by a servant, which changes a simple theft into a qualified theft: forgery committed by a public official, etc.).

Our law has not positively decided this point. When it is considered that these aggravating circumstances are founded on an incommunicable quality of the individual, and on the violation of the special duties implied by this quality, it seems that they can constitute, strictly, only a personal aggravation, like that connected with repetition; that they should be considered separately for each agent; and that their application should be limited to that particular agent in whom this special quality exists, whether he be co-author or accomplice. Yet our jurisprudence readily accepts the contrary opinion, and assimilates these aggravating conditions to material aggravating circumstances. It admits that, since the aggravation modifies the intrinsic guilt of the act itself (if the quality in question exists in the person of the principal agent or of one of the principal agents, since it is taken no account of in the persons of the accomplices), its effect should consequently extend to all the participants in the offense, co-authors or accomplices, although the same quality may not exist in their persons. Thus the strange accomplice of the parricidal son will be liable to the penalty inflicted for parricide, the foreign accomplice of the thieving servant will be liable to the penalty for domestic theft. On the other hand, the son who has hired a stranger to kill his father, will be liable only for the penalty of ordinary murder; the domestic who opens the door to the strange thief, is liable only to the punishment for simple theft. In each case the criminal is considered only the accomplice of an ordinary murder or a simple theft.

Although these results may appear logical from the standpoint of strict jurisprudence, it is difficult to accept them in reason and in equity. The majority of writers on criminal law have declared their preference for the purely personal system of aggravation adopted by many codes (German code, art. 50; Holland code, art. 50). As to the Italian code of 1889, it ingeniously combines the two standpoints and the two systems.

## SIMPLE REITERATION AND REPETITION.

(Art. 365, sec. 2, of the Code of Criminal Instruction and arts. 65-68 of the Penal Code.)

The majority of offenses attributable to the same agent (whether he be the author properly speaking or the accomplice) can be classified under two headings, which are widely differentiated by our law and by most modern legislation: (1). The simple reiteration or the simple accumulation or concurrence of offenses; (2), the repetition, strictly speaking. It is necessary, in order that repetition may exist in the eyes of the law, that there should have been a previous definite sentence and that it should have reference to a previous offense. It is this warning that the delinquent has already received from justice (and by which, as shown by his relapse, he has failed to profit) that serves as a basis for the aggravation of the penalty entailed by the repetition; the lack of effect of the first condemnation seems to prove that the ordinary penalty, enacted for the usual delinquent, is ineffective so far as this agent is concerned. In the absence of this condition, and in case of acts that have not undergone prosecution and definite condemnation, there is no longer repetition, properly speaking, but simple reiteration or accumulation or concurrence of offenses; that is to say, a situation subject to different rules.

## SIMPLE REITERATION OR CONCURRENCE OF OFFENSES.

It seems that in this case the only rational solution, the simplest and at the same time the most natural, was to accumulate the penalties against the delinquent in proportion to the accumulation of offenses; to make him liable to the penalty connected with each offense committed by him, without increasing these penalties, but also without diminishing or excepting any of them; for if the multiplicity of offenses itself, without the repetition, is not an aggravating cause, it is even less an extenuating cause, or one that would entail impunity.

Nevertheless, most legislators have been obliged to realize that this system of accumulation was impossible in certain penalties (such as death or punishment for life) and would be too severe in other cases. The accumulation of even temporary penalties, although materially possible, would result, unless the rule were limited, in a punishment out of all proportion in its degree or duration to the gravity of the offenses. It has thus been found necessary to combine the different punishments in one, the most severe, although this penalty may be increased in case of need; this is the system or principle of the non-accumulation of penalties.

Our law sanctions this system, so far as crimes or misdemeanors are concerned, in article 365, second paragraph, of the Code of Criminal Instruction.<sup>1</sup>

But while adopting this principle of nonaccumulation (borrowed from the law of criminal procedure of September 16, 1791, Part II, Head VIII, art. 40; and the Code of Infractions and Penalties of Brumaire 3, IV, art. 446) the Code of Criminal Instruction of 1808 has given it a breadth of application which is open to criticism.

<sup>1</sup>It is in this code, and in the midst of provisions relating to procedure before the court of assizes, that the legislator has made the mistake of inserting this rule, although it deals with criminality itself, and should in consequence have been incorporated in the Penal Code.

Not only does it sanction it in a general way for crimes or misdemeanors,<sup>1</sup> but it declares that the penalty for the lesser crime or infraction shall be merged in the penalty for the more serious crime or infraction, and that the latter alone shall be enacted. It neither prescribes nor authorizes any aggravation of this last penalty. The judge can raise it to the maximum, but he is not obliged to do so, any more than in the case of the single crime or offense.

Thus the author of several crimes or offenses, although obviously more culpable, is treated neither more nor less severely than if he had committed only one. This is, in a way, an invitation to increase the number of infractions. Except in cases when accumulation is impossible and aggravation difficult, as for crimes incurring punishment for life, there is an excessive indulgence in this system which it is hard to reconcile with the rigorous treatment applied to repetition, and which is surprising on the part of the legislator of 1810. It is opposed to the ordinary spirit of this code and to the general severity of its provisions, although perhaps the explanation, if not the justification, of the provision under consideration may be found in this very severity. The legislator may have thought that, since the punishments which he had enacted were rigorous, the most severe one, by its possible elevation to the maximum, would always place at the disposition of the judge a penalty which would suffice and more than suffice for the repression of multiplied infractions.

This rule is none the less open to criticism; and recent penal legislations show a general tendency to deviate from the system adopted by our law, either by accepting the principle of accumulation of penalties, limited by a maximum, or by making the multiplicity of offenses constitute a cause of aggravation for the penalty imposed for the most serious offense; which makes a sort of composite system, the resultant of penalties enacted against the various concurrent offenses.<sup>2</sup> The same tendency is found in the plan of revision of our Penal Code, whose provisions on this subject (arts. 85-91) are practically the same as those of the Belgian code of 1867.

The rule of nonaccumulation of penalties is restricted to crimes, in case of concurrence of crimes only, or of crimes and misdemeanors (*délits*). In the first case (concurrence of crimes only) the most serious punishment can be raised one-half above the maximum. In case of concurrence of misdemeanors (*délits*) only or their concurrence with trespasses (contraventions) the accumulation of penalties is, on the contrary, admitted, with its application restricted to double the maximum of the most serious punishment. The principle of nonaccumulation of penalties is still applied in an absolute manner, as it is

<sup>1</sup> This universal application of the rule of nonaccumulation of penalties for misdemeanors (*délits*) was first called in question on account of the provision of article 365 of the Code of Criminal Instruction; but doubts have long ceased to exist, in view of the generality of the text, "In case of conviction of more than one crime or misdemeanor the most severe penalty shall alone be enacted."

But this rule is limited to crimes and misdemeanors. It does not apply to trespasses (contraventions), penalties for which should always be accumulated. They can never be excessive, since the degree of punishment of simple police offenses is very small; and the rule of nonaccumulation, already open to criticism when applied to misdemeanors, would have the serious inconveniences of placing at the disposition of the police magistrate only an insignificant punishment for multiplied trespasses (contraventions).

<sup>2</sup> Our code itself has applied, but as an exception, this provision in case of article 304 of the Penal Code, for murder accompanied by another crime or offense. This concomitance constitutes an aggravating circumstance of the murder, which raises the penalty to death, instead of penal servitude for life.

now, in case of accumulation or "ideal" concurrence of infractions, as it is called—that is, one act which includes several violations of the penal law.

#### REPETITION.

This is also the relapse into the infraction, but the relapse after correction and condemnation. The law does not exact that the penalty should have been undergone. It suffices that there has been a definite and unrepealed sentence at the time that the new offense is committed.

The law subjects the repetition, thus understood, to treatment and to rules very different from those enacted for simple reiteration. The penalty for the new act does not absorb the penalty incurred by the preceding prosecution and sentence, nor will it be absorbed by the first penalty. Both should be carried out and suffered to the degree that is possible in fact. Not only will penalties not be blended, but the new penalty will be, in principle, increased by the preceding sentence.

This increase of punishment for the repetition is found in most modern legislation, as a sort of general aggravating circumstance, based on the greater menace to society which is indicated by the repetition. The inefficiency of the warning given by justice, and the contempt of the agent for the same, denote a dangerous propensity and a spirit of stubborn persistence in evil, which need greater severity of treatment. The ordinary punishment, calculated for delinquents in general, is insufficient in this case.

Hence we see in the legislator a natural and instinctive tendency to increase the penalty, to remedy the inadequacy as shown by the inefficiency of the first condemnation. For the same reason the principle of aggravation of the punishment in case of repetition occurs very early in the domain of penal legislation; at least when it is a question of the same offense or like offenses. This is, in fact, on account of the identity or analogy of the actions, the most striking and characteristic instance of criminal habits or propensities. It is the one that first specially invites the attention and the severity of the law; the one instance of repetition which was usually recognized and punished by ancient legislations. Only later did the judicial mind discern the common source of various illegal actions, i. e., the contempt for the law and for the conditions essential to social order. The law then reached the conception of punishing repetition in general—that is, actions of different sorts.

To-day, as we have said, this principle of increase of the penalty is found in most modern laws, but the extent of its application and the conditions under which it is applied differ materially according to the various legislations.<sup>1</sup>

Thus, while all legislations distinguish the repetition from the simple reiteration in a general way, and require before admitting the former that the delinquent shall have received a previous warning from justice, some of them, like our law, make this warning the result of the sentence alone, without any execution of the penalty, and others

<sup>1</sup> These differences, besides making it difficult to obtain comparative statistics of repetition in the separate countries, will for a long time (in spite of attempts in this direction by several recent codes or plans of codes, such as the Neuchatel Code of 1891, art. 96—plan of the Swiss Federal Penal Code) retard international suppression of repetition, which considers the judicial antecedents of prisoners in foreign countries.

require this execution. Some punish the repetition in general as well as in particular, while others punish only the latter condition. There are even differences as to the length of time which has elapsed between the previous sentence and the new action, as to the nature and the obligatory or optional character of the aggravation, etc.

Let us consider the ordinary repetition of crimes and misdemeanors (*délits*) recognized by the Penal Code (arts. 57-58), leaving out of the question the repetition of trespasses (*contraventions*) and that of certain special offenses. Our law provides for and punishes three classes of criminal or "correctional" repetition; the case when a crime follows a crime, recognized by article 56; when a misdemeanor follows a crime (art. 57), and when a misdemeanor (*délit*) follows a misdemeanor (art. 58). The case of a crime following a misdemeanor (*délit*) is not subject to legal restraint, in principle, and does not entail increase of penalty. A comparison of the penalties for the two infractions seemed to the legislator to prove that such increase was superfluous. Since the first penalty was only of a "correctional" nature, it can not be concluded that it was ineffectual so far as the second penalty (a criminal one) was concerned. The legislator thought that the criminal penalty would always allow the judge, through its possible elevation to the maximum, a sufficient margin for the increase of severity required by the circumstances.<sup>1</sup>

As to the aggravation entailed by the repetition, it consists for the first hypothesis (crime following crime) in the increase of the penalty one degree. The punishment next above in the scale of criminal penalties is substituted for it, unless there should occur in this way the transition from a temporary to a perpetual punishment. In this case the repetition, since 1832, simply incurs the maximum of the temporary penalty, with the option granted the judge to double this maximum. Thus the penalty of imprisonment is raised to that of penal servitude. The latter is raised to its maximum, with liberty granted the court of assizes to double the latter, etc. (Art. 56.)<sup>2</sup>

As to the two other hypotheses of repetition—misdemeanor (*délit*) following crime, and misdemeanor following misdemeanor—the chief penalty of imprisonment incurred by the offense is raised to the maximum, and the latter may be doubled. The accessory penalty of police surveillance (to-day changed into simple prohibition of residence) remains unaltered as a guaranty against the danger of yet another repetition. (Art. 57-58.)

Such is the increase of penalty on account of repetition. This

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<sup>1</sup> The impunity of this case of crime following misdemeanor has been restricted since the law of May 13, 1863. When, on account of excuses or extenuating circumstances, the penalty for the crime is reduced to "correctional" imprisonment, the action is thus assimilated to a misdemeanor (*délit*) when considered as a repetition, which makes the case come under arts. 57 and 58.

<sup>2</sup> The code of 1810 applied this rule absolutely, even in case of crime incurring penal servitude for life. This penalty was raised to that of death. The law of 1832 did not wholly change this unjustifiable increase, but restricted it to the case when the delinquent had already been sentenced to death or to penal servitude for life for the previous infraction. It is to be regretted that it was not excluded even in this case. But by the system of extenuating circumstances, this extreme may be avoided. I may also mention in this connection another unfortunate provision of the same article, substituting, in case of repetition, penal servitude for life for transportation: that is, a penalty of common law for a political penalty, although the distinction between the two scales of criminal punishments is respected elsewhere in this article. This is an anomaly which the law of 1863 should have corrected.

increase is obligatory upon the judge, who can not refuse to admit it in deciding the character and the degree of the penalty. But, although legally obligatory, it is really indirectly optional, especially in "correctional" matters, on account of the extenuating circumstances, which the judge can admit whenever special conditions seem to belie the legal presumption of greater perversity and greater social peril implied by the repetition, which are the reasons for increasing the penalty. This presumption can not be considered as absolute. It will often be contradicted by the actual facts, which explains the failure of the various propositions made during the century, having for object to limit the effect of extenuating circumstances in case of repetition. The last of these propositions was made during the discussion of the recent law of March 26, 1891, on the diminution and increase of penalties.<sup>1</sup>

This last law, if it has not decided this point, has made important changes over previous legislation in other parts of the system of repetition. It has also completed this system, so far as the repetition of misdemeanor after misdemeanor (*délit*) is concerned, by the addition of a new case of punishable repetition.

Our legislation, before the law of 1891 did not take into consideration the time elapsing before the second offense was committed—at least in the ordinary cases of crimes and misdemeanors. Since the previous sentence was in existence, not effaced by amnesty or rehabilitation,<sup>2</sup> the length of the interval between this sentence and the new offense was thought of little importance, although the lapse of time may seem to weaken the presumption which causes the increase of punishment for the repetition. The less positively one can affirm the inefficacy of the first sentence and the first punishment, the less one can infer in the delinquent a perversity and stubbornness above the average.

For the above reason there appears in most recent foreign codes a sentiment in favor of considering the question of time in connection with the repetition.<sup>3</sup>

Following the same tendency, the law of March 26, 1891, through an amendment introduced by the Senate committee into the original plan, subjected the repetition of crime after misdemeanor, and that of misdemeanor after misdemeanor (arts. 57 and 58) to a suspension of sentence. To have a punishable repetition, according to these articles, it is necessary that the second offense should have been committed within five years after the expiration or limitation of the

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<sup>1</sup>This is the law which, thanks to M. Bérenger, introduced in our practice the plan of delay of execution of the punishment in case of delinquents who have committed but one offense, with definite remission of the penalty and virtual and legal rehabilitation if within five years they have not incurred another sentence. This law includes provisions of two different classes—one in regard to the diminution of the penalty for the first offense, which is the plan of delay; the other in regard to the increase of the penalty for the repetition. These two classes of provisions have the common object of preventing the repetition, either through indulgence for the first offense or increased severity for the second. Here only the second part of the law, the least known, is considered, in regard to the increase of penalty for the repetition. As we will see, the law deviated from its original idea during its parliamentary elaboration. It has rather lessened than increased the penalty for the repetition.

<sup>2</sup>It is only since the law of August 14, 1885 (modifying art. 634 of the Code of Criminal Instruction), that rehabilitation effaces the sentence.

<sup>3</sup>Belgian code, arts. 56 and following; German, art. 245; Dutch, arts. 421 and 423; Italian, art. 80, etc.

preceding penalty (so long as the punishment is still in course of execution, the delinquent should not receive credit for not committing a new infraction); after this delay, although the sentence may, in default of rehabilitation, still be in existence, it no longer is made a reason for increasing the penalty for the repetition. It is only in case a crime follows another crime (art. 56) or, more properly speaking, when a criminal penalty follows another criminal penalty, that the threat of increase remains permanent.

Besides this innovation, the theory of which can be defended, the law of 1891 enacted another, in regard to the character of the repetition, which in my opinion is more open to criticism.

Thus far in our legislation the repetition had a general application—that is, the ordinary repetition—special offenses, which by their nature would require special repetition are not considered. The identity, or even the analogy of the illegal actions was not exacted. Our legislation, following the tendency of recent penal legislation in Europe,<sup>1</sup> has admitted the existence of the general repetition only in the two first hypotheses recognized by the Penal Code—i. e., when a crime follows a crime (art. 56) and when a misdemeanor follows a crime (art. 57); but the theory has been abolished in case of misdemeanor following misdemeanor (*délit*), (art. 58). The identity of the offenses is now exacted. The repetition is no longer recognized for infractions of different natures. Thus, for instance, the person who has been previously condemned for theft, and who is guilty of having outraged modesty, or of having inflicted blows or wounds, is not treated as though he had repeated an offense.<sup>2</sup>

Through this double innovation the law of 1891, in spite of its title, and by an unfortunate deviation from its original object, has made the mistake of decreasing the penalty for the repetition, and especially in the case when a misdemeanor follows a misdemeanor (*délit*). But it has been completed and strengthened on another point by the addition of a new case of punishable repetition—small repetition (*petite récidive*), as it has been called, to distinguish it from the ordinary repetition of misdemeanor following misdemeanor, or crime following crime.

The case, the only one provided for by previous legislation and original article 58, presupposes a sentence exceeding one year of imprisonment (whence the frequency in practice of sentences of a year and a day of imprisonment). Sentences less than a year in duration were not thought worth considering in case of repetition; the warning appeared inadequate because of the insignificance of the punishment; no positive conclusion as to its inefficacy could be drawn. Here was a field of impunity, where repetitions could multiply without fear of legal severity. And such was, in fact, the case. Statistics show that repetitions committed under such conditions (small repetitions) formed nine-tenths of the total number. Certain delinquents were even able to repeat an offense several times in the same year, owing to the short duration of each penalty. The law of 1891 remedied the difficulty by incriminating this form of repetition. By an amendment to article 58, the agent who has been sentenced to imprisonment of less

<sup>1</sup> As we have seen, a regressive tendency.

<sup>2</sup> But as a corrective to this system of specializing the offense, swindling and abuse of confidence are considered as the same offense, as well as vagrancy and beggary from the standpoint of repetition.

than a year, and who is subsequently guilty of an infraction (if it is the same infraction, and provided it shall be committed within five years from the expiration of the previous penalty, as in the case of ordinary repetition of misdemeanor upon misdemeanor) is considered as though he had repeated an offense, and is so punished.

In practice (which is slightly different) the agent is sentenced to imprisonment which shall not be less than the double of the previous penalty, and not exceed the double of the maximum of the previous penalty. It was desired thus to insure a progressive increase and prevent the abuse of the short penalties of which I have just spoken.<sup>1</sup>

Such are the provisions of our Penal Code in regard to the repetition of offenses. They are not free from complication, especially in their application and details. But this complication (as in the case of other theories, such as that of extenuating circumstances) is only a consequence of the general imperfection of our system of penalties, which needs to be reduced and simplified. This is one of the objects of the plan of revision of the Penal Code, and is being successfully realized.<sup>2</sup>

Whatever may be thought of this system as a whole, it must be admitted that there is a point where all increase of penalties, however well calculated, as well as all possible combinations of penitentiary imprisonment, become ineffectual; that is the point where incorrigibility begins. To inflict upon such a delinquent a simple increase of punishment, to release him and return him to the world after a detention more or less prolonged, is to inevitably open the way to new infractions. One measure alone is efficient—the elimination, the entire withdrawal, of the delinquent from ordinary society, to which he can not adapt himself, either by means of confinement for life,<sup>3</sup> or even better, when nations can have recourse to this method, banishment to remote colonies. The work of the anthropological school of Italy has abundantly and definitely demonstrated this necessity.

The law of May 27, 1885, adopted the last plan as a complement to the provisions of our Penal Code on the punishment of the repetition, and enacted exile to the colonies for life, after the expiration of the other penalty, against those malefactors who, on account of the number and the nature of their sentences, could and should be considered incorrigible. In spite of some disappointment caused by the practical working of this law, and in spite of just criticism of its imperfections, this principle is excellent, and the plan of revision of the Penal Code is right in its intention to retain it.

But this is outside of the limits of this study and of our examination, which, as we announced, is confined to the general elements of the misdemeanor (*délit*) and to the theories connected therewith.

<sup>1</sup>To better insure this result, the plan limited further the effect of extenuating circumstances; but this limitation, as I have said, was not admitted, so that the increase remains, in point of fact, optional for the judge, who can dispense with it through the theory of extenuating circumstances.

<sup>2</sup>For particular instances of repetition see art. 64-65 of the plan. As I have already said, the latter restricts the effect of extenuating circumstances in the case of repetition. The principal effect is connected with the repetition, with the possible increase of the penalty one-third in certain cases.

<sup>3</sup>The indefinite sentence, which has recently been in question, is really only a step toward this radical solution which no one dares face, a euphemism to disguise perpetuity.

**CRIMINAL PROCEDURE.**

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Penal procedure brings into action incongruous interests; formulas of reconciliation are still discussed in legislative assemblies. What is needed is an ideal organization, firm enough to prevent the escape of a criminal, too flexible to permit the prosecution, and especially the condemnation, of an innocent person. Society demands rigorous measures of investigation and prosecution—which may, perhaps, result in the apprehension of a person wrongly suspected; in the interest of the individual there should be liberty to defend and to contradict, which may abuse justice and save the guilty. How shall these rival interests, both legitimate, be treated by the law? The different systems of procedure are characterized by their answers to this question.

It has been the custom to classify all systems which we find in history or in contemporary institutions according to two principal types—procedures of accusation, and procedures of investigation (*procédure accusatoire, et procédure inquisitoire*).

*Procedure of accusation.*—This is based upon the principle that no criminal process can be begun unless there is an accuser. As in civil matters, a tribunal can not decide a question of debt unless some one shall appear to demand the payment of the debt, so in penal matters the court can not bring the case up for action. No judge without an accuser.

The accuser may be the person injured, or “those of his lineage.” We have an example of this system in the procedure of the old feudal codes. Although the offense is liable to punishment in the actual sense of the word, and can no longer be atoned for by a pecuniary fine payable to the victim, this form of the process of accusation is none the less derived from the ancient idea of private vengeance. Formerly the offended person avenged himself on the offender; sometimes a compromise was made. Authority, recognizing its rights and its duty, regulated these agreements (*compositions*) in order to prevent new disorders; it finally took charge of the punishment, but it still waits until the injured person demands it.

In a higher conception, anyone may act as the accuser. As the crime is against public order and not against the victim and his family alone, any person, although not injured, may act for society, and has the right to put in movement the procedure to punish the wrong. This is no longer the private, but the popular accusation. In English law any citizen may become accuser, and prosecute in the name of the King; that is, in the name of society personified in the sovereign.

If we consider a moment these varieties of procedure, they seem to offer the maximum of guarantees in favor of the prisoner. The judge decides between two equal parties which can freely produce their evidence. Penal processes differ little, if at all, from civil processes. Discussions are public and free to both sides. The prosecution of the accused, the preliminary arrest and detention, are subjected to close restrictions in order that they may not be open to abuses (see the

English law); or at least that they do not favor the plaintiff in the effort to maintain the same precautions as to both adversaries (as in the procedure of accusation of feudal courts, "Uterque in prisonia ducis mancipandus est").

But there are certain drawbacks to prosecution by individuals; the most important, but not the only serious one, is the possible impunity of a large number of delinquents against whom no accuser will appear. Through indifference, through fear of new danger, or for money, the third party or the injured party will sometimes maintain silence, and not concern himself with public safety. Thus it is necessary to have recourse to correctives of the system (such as associations formed to insure the punishment of certain offenses), or to change the foundation of penal action.

*Procedure of investigation.*—The judge brings up the case of his own accord; he seeks, in order to punish them, the authors of all crimes that may come to his knowledge, although no accusation may be brought. The official prosecution is the first feature which distinguishes the procedure of investigation from the procedure of accusation.

This procedure originated, in our ancient law, in the inconveniences of the private accusation, or that "par partie formée," as it is called. It was not created all at once, but owes its existence to a series of particular cases: Flagrant infraction, public notoriety, denunciation when the complainant desires personal reparation but does not wish to incur the danger of accusing (whence arose the constitution of the civil party). How this evolution was effected, how the jurisdiction of the laity imitated in this respect the jurisdiction of the church, would take too long to explain here; but it is true that the "extraordinary" procedure, as it was called then, constantly extended its scope by encroaching on the old form of the procedure of accusation. After being developed by jurisprudence it passed into the text of royal ordinances, among which we will mention those of 1498, of 1539, and the famous ordinance on criminal procedure of 1670, which prevailed in France until the Revolution.

The official prosecution is not the only difference between the system of investigation and the system of accusation; they are also distinguished by the methods of instruction and of trial. This is easily understood. The process by private accusation is only a case between two individuals, where authority intervenes to classify evidence and to decide a contest to which it is not indifferent, but which it did not itself create. In the procedure of investigation judicial authority officially instructs and judges; it directs the entire affair. The prisoner is no longer before a personal adversary; he is before, or rather in the power of, a formidable opponent. He is arraigned by social power and is involved in a process where resistance is difficult. On one side it is the question to more effectually repress infractions. The process remains secret, rigor is increased, in order that the evidence may not be changed and the investigation diverted; in order that the suspected person may not elude the indictment, in order that he may be convicted in spite of his denial. On the other side, if there is evidence in his favor, the proper authorities, following the natural inclinations of such organizations, will administer justice. The judge will be able to recognize the favorable evidence in the course of the case, without the arguments of a lawyer, in the examination of the prisoner, in the testimony of the witnesses, in the confrontation of the prisoner and the witnesses.

As Pussort said in the preparation of the ordinance of 1670: "It was found from experience that the counsel assigned made it a point of honor, and believed it his conscientious duty, to prove in any way the impunity of the prisoner." There are degrees in all this; so many influences, fortunate or otherwise, modify the course of human institutions that they differ widely, even though based on the same principle. But it is beyond question that the ordinance of 1670 resulted in the severest application of the principle of investigation: the oath to tell the truth imposed upon the prisoner; the criticism of the testimony poorly organized for the defense, and only after the "recolement" or new affirmation of the evidence by the witness, who could not henceforth retract what he had said without incurring the penalty for false testimony; the aid of counsel forbidden in the most serious crimes; the final decision rendered by the assembled tribunal, from notes of information, without having heard the testimony orally; the torture of the prisoner, "the preliminary question," sometimes ordered, to extract his confession when the crime of which he was accused involved the punishment of death.<sup>1</sup>

*The public prosecution.*—Official prosecution belonged at first to the judge; but he might ignore the crime and misdirect the inquiry. A new factor has been introduced into the procedure, having for its primary function to stimulate the zeal of justice. This consists of the public prosecutors—the fiscal procurators or lord's attorneys of feudal days. There is here a curious transition. The public prosecutors, who are at first business men of the Kingdom and afterwards become public officials, do not bring suit themselves. They denounce the crime and ask the judge to cause the arrest of the culprit. They then take part in the prosecution, either alone or together with the private denouncer, who remains an interested party. Their prerogatives are increased. Not content with instigating or supervising a suit the initiative in which is left to the judge, they have themselves the right to act. This brings us to two important maxims which prevailed in the old law: "The royal (or fiscal) prosecutor is the sole and true accuser"—not the victim of the offense, although the latter may bring indictment and prosecute as a civil party. But as a continuation of the first idea, the judge himself should, if necessary, bring up the case; so we have the second maxim: "Every judge is an attorney-general."

If the public prosecution is considered as invested with the power to bring suit, it will be seen that this institution, which appears to us from an historical standpoint as the complement of the system of investigation, should in theory be distinct. The public prosecution acts in the interest of society; but if it is the plaintiff, it is not the judge. The prisoner is in much the same position as though he were before another accuser. Official vigilance makes up for the hesitation of individuals, too often found in private or popular prosecution; but official indictment by a public party certainly belongs to the procedure of accusation. It may, however, be combined in different ways, during the examination and trial, with the procedures of investigation or the contrary processes. It is one of the questions of the age to grant sufficient means of defense or of reply to the individual against the powerful action of the public prosecution without at the same time disarming society.

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<sup>1</sup>Histoire de la procédure criminelle en France, et spécialement de la procédure inquisitoriale depuis le XIII<sup>e</sup> siècle jusqu'à nos jours, par Esme.n. Paris, 1882.

*The Revolution and the laws of the intermediate epoch.*—Certain articles in the ordinance of 1670 aroused eloquent protests even during its preparation. “Although the lawyer may have saved a few guilty persons,” said Lamouignon, “it may also happen that for lack of counsel an innocent person will perish.” But it was in the eighteenth century that criticism of the criminal procedure became animated; philosophers incessantly proclaimed its abuses, public opinion was aroused, and accounts of judicial errors proved the necessity of a radical change. A few improvements had been outlined, when the Revolution swept away all old ideas. The work of reconstruction was begun several times.

We will pass rapidly by the law of October 8-9, 1789. It was a hasty measure, retaining the old system, but introducing urgent reforms. It was only provisional and temporary. The law of September 16-29, 1791, was the real foundation of the system (decree concerning the police de sûreté, criminal justice, and the establishment of juries).

The publicists of the eighteenth century were constantly comparing the system of investigation with English institutions, the jury, the rights of the prisoner, etc. The memorials (*cahiers*) of 1879 followed the same lines. The imitation of English law was the most apparent characteristic of the new organization. A vain effort was made by some of the members of the Constituent Assembly to revive the old system, with many changes and with the possible addition of the jury, but still following the precedents of centuries.

The legislator was subjected to another influence. The Parliaments, which sometimes had served the interests of royalty and sometimes had vigorously resisted them, would naturally resent the new order of things. England offered the example of a liberal system which it was easy enough to adopt; and the lessons or prejudices of the past urged the entire destruction of the old magistracy, of those powerful courts which might one day become independent or hostile.

From this come the separation of the two judicial systems, civil and criminal, formerly united; also the decrease of prerogatives—almost the entire suppression—of the public prosecution; but, on the other hand, a judicial system was established which should be administered by the people, through the jury, and a sort of popular action by means of civic denunciation.

There were three classes of penal jurisdiction for the three sorts of infractions: the tribunals of municipal police, the tribunals of correctional police,<sup>1</sup> and the criminal judiciary.

Criminal justice was divided into three distinct periods—the preliminary examination, consisting of a summary before an officer of the judicial police in the township; the continued examination before the indicting jury (*jury d'accusation*) of the district; the final trial and sentence in the criminal tribunal of the province. The officer of the judicial police was a justice of the peace or an officer of the gendarmes; the indicting jury, composed of 8 jurors, was presided over by a magistrate who acted as foreman of the jury; the criminal tribunal of the province comprised 12 jurors to try the case,

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<sup>1</sup> We were forced on account of the lack of space to overlook, in our review of the old law, the offenses of less gravity which did not entail extraordinary procedure, or in which the criminal process was changed into the civil process. (See especially Guy du Rousseaud de Lacombe, Treatise on Criminal Matters, Part III, Chap. XIX.) We will also omit here (although there is no comparison between the old system and that of intermediate law) the rules governing municipal and correctional police. (See especially law of July 19-22, 1791.)

and 3 judges, with a president, who pronounced the sentence. We will consider the question of the jury later; the oral pleadings, the publicity, the liberty of defense constituted definite reforms which we find again with an important difference in the present law; but on other points changes have been made in the principles of the code of 1791.

The justice of the peace orders the appearance of the accused; he hears the witnesses and makes a preliminary inquiry, which is followed by another examination before the jury, the latter alone having the right to indict before the criminal tribunal. He acts officially, or at the instigation of individuals—that is to say, on the complaint of the injured party or on denunciation by any citizen. The plaintiff or the denouncer can, in case of his refusal, submit the affair to the indicting jury; but the public prosecution does not appear until after the second stage of the process. It figures in the criminal tribunal in the double function of a chosen public accuser who sustains the indictment and of a royal commissioner who demands the application of the law. The right of prosecution conferred upon simple individuals but not upon the public prosecution, which takes part in the case too late; the official action intrusted to the justice of the peace, who from this time has two functions (a dangerous combination, since he is the temporary arbiter of the liberty or imprisonment of the accused after having taken the initiative in the prosecution)—in short, this examination before the officer of the judicial police, brief and often unsatisfactory, and of little assistance to the indicting jury, which hears the witnesses again and does not read the depositions which the justice of the peace has had written—all the elements of the preliminary proceedings and examination have been changed by subsequent laws. The work of 1791 has been reconstructed with the aid of principles taken from the old system.

We will not follow the variations of intermediate law in regard to the function of the public prosecution or the composition of the jury. We will not study the precision, amounting to formalism, which the code of offenses and punishments of Brumaire 3, year IV, gave to the procedure, or the strong reaction of the laws of Pluviôse, year IX. The law of Pluviôse 7 intrusts the prosecution to the public prosecution, and reorganizes the preliminary examination. The jury system, which was bitterly criticised, seemed inefficient in view of the brigands who overran the country, and its authority was decreased by the establishment of an extraordinary jurisdiction (special criminal tribunals, instituted by the law of Pluviôse 18, year IX).

*The Code of Criminal Instruction.*—By decree of Germinal 27, year IX, a committee was ordered to prepare a code covering penal law and procedure. The observations of tribunals, the discussions of the State council, offer a series of criticisms upon the material accumulated by tradition previous to 1789 and by legislation after the Revolution. Two distinct codes were finally promulgated, the Code of Criminal Instruction of 1808 and the Penal Code of 1810, both to go into effect on January 1, 1811; they were completed by the law of April 20, 1810, on the organization of the judiciary and the administration of justice.

1. The institution of the jury was again debated, both as to its merits after it had been tried and on account of the confusion it caused in the union of civil and criminal jurisdictions. This union was to raise the prestige of courts and give the magistracy the authority which is its due. The imperial courts received both juris-

dictions; the jury was not sacrificed. The court took part in the examination by the chamber of indictment; it participated in the trial of offenses (*délits*) by means of appeal from correctional police tribunals (original arts. 200, 201); in the trial of crimes the judges were members of the court of assizes. The indicting jury was abolished; the jury of trial (*jury de jugement*) alone was retained.

2. The procedure was a combination of old principles and subsequent innovations; the examination was conducted according to the old system; the method of trial was prescribed by the laws of the revolution. The preliminary examination, although no longer as rigid as formerly, yet had many of the features of the ordinance; it was to be secret, written, and did not allow the prisoner the right to reply. In spite of the cleverness and the dissimulation of the criminal the charges had to be verified. Of course testimony on both sides was to be taken, but this was left to the discretion of the judge. The law allowed the prisoner no control in this matter. In the final trial it was quite different—the aid of counsel, freedom to reply, oral testimony, were admitted. Nothing was spared to enlighten in regard to the truth those with whom the verdict rested. The hearings were open to all, as if to place the decision of the jury and the sentence of the judge under the surveillance of public opinion. The preliminary examination was left entirely to the wisdom of the magistrate; the pleadings were open equally to the prosecution and the defense.

*The plans of reform.*—There were many amendments to the code of 1808. Some were due to changes of government, others to rational modifications, the need of which was early demonstrated. Judicial organization and procedure have always been subject to the rebound following the establishment of authority; this is a fatality verified by the history of law. The methods of punishment of actions which come under common law, *a fortiori* in political offenses, are always in conflict with social exigencies and with the theory of personal liberty. Constitutions are influenced by the opposing necessities of authority and of liberty. Apart from these vicissitudes a steady and more technical elaboration of law and jurisprudence is taking place, which aims to define or to reform theories, to put them in harmony with each other and with the general condition of customs or of progress.

These numerous and sometimes important changes (for instance, in regard to the authority and the selection of the jury) have not modified the general plan of the law. We will not stop to enumerate them now, but will mention the principal changes in our study of the legislation itself. But we must note a more serious reform, difficult to outline, and the future of which can not be foretold. It refers to the preliminary examination, and is on the side of the defense. It has arisen from scientific discussions, from the polemics of the press, and from a comparison of foreign laws. The movement dates officially from 1870, when a commission to consider it was appointed, or, more exactly, from 1878. In this year a new commission in the department of justice prepared a plan on the subject-matter of the first book of the code. This plan was presented to the Senate in 1879, and adopted on August 5, 1882, with conditions which restricted its import. Since that time it has been considered in the Chamber of Deputies, and delayed by various causes, especially by the changes in personnel of the chamber.

We now have several versions: the Government plan of 1879; the articles adopted by the Senate in 1882, which are materially different; the propositions reported by the committees of the Chamber, which

more nearly resemble the original plan (see especially the report of the committee during the session of 1891, No. 1114, comparing the provisions suggested with those passed by the Senate). On February 20, 1894, the Government again presented the plan to the Chamber of Deputies. (*Journal officiel: Parliamentary documents*, session of 1894, schedule 411.)

The reform proposed by the Government, or by the committee of the Chamber, was as follows: The examination should grant the prisoner the right of contradiction. Various innovations were allowed—the assistance of counsel, the communication of the procedure to the prisoner,<sup>1</sup> the right to have recourse to all measures of utility, and to appeal in case they were refused.<sup>2</sup> The final trial afforded the accused all possible safeguards against judicial error. It was also desired that the prisoner should have certain rights during the examination to avoid possible mistakes, which, despite the perception of the magistrate, might cause the person who has been arrested on wrong evidence to be kept some time in preliminary detention. It was not intended that the examination should consist of a discussion between the judge or the public prosecution and the prisoner, but only that the latter should have the right of criticising or of controlling the procedure. How should this be accomplished without compromising the authority of the examining judge, without impeding his investigation? At what moment and under what conditions should he permit control of his actions—an actual and effective control, or a control *ex post facto*, perhaps subordinate to his will? This is the chief point in discussion—less important in verifications<sup>3</sup> than in oral evidence,<sup>4</sup> in

<sup>1</sup> Art. 151, Senate plan; art. 153, plan of the committee of the Chamber.

<sup>2</sup> Art. 51, plan of the Senate; art. 50, plan of the committee of the Chamber.

<sup>3</sup> See, for instance, title 2, chap. 2, sec. 2, of *transports*, perquisition, and seizure. [The word *transport*, or *transport sur les lieux*, designates in French law principally the case in which the examining magistrate goes to visit or inspect the place where the crime has been committed.]

<sup>4</sup> See especially plan of the committee of the Chamber, 1891:

"ART. 78. Witnesses shall be heard in presence of the public prosecution, of the civil party, of the prisoner, and of their attorneys, duly notified, with the exception of what is said relative to examining commissions, and unless an ordinance prohibiting communication has been issued by the judge of instruction, according to art. 123. In this last case, etc. \* \* \* In the plan of the Government of 1879 this presence during the hearing of the witnesses was dependent upon the permission of the judge of instruction. (Art. 64.)

"ART. 138. Except in case of urgency, the judge of instruction can not question the prisoner except in presence of his counsel, or the latter duly notified.

"ART. 151. The attorney can enter the room of instruction (*cabinet d'instruction*) with the prisoner, under arrest or free, each time the latter is summoned. It is forbidden him to speak except when the judge grants him permission. If the judge refuses, the fact is noted in the *procès verbal*."

Plan of the Senate, 1892:

"ART. 79. The witnesses are heard, even in cases in which the judge makes a journey of inspection, out of the presence of the public prosecution, of the civil party, of the prisoner and their respective counsel, by the judge of instruction, assisted by his clerk.

"ART. 138. The questioning and the confronting take place, even in case of inspection journeys, out of the presence of the public prosecution, of the civil party and his counsel, and of the prisoner's counsel.

"ART. 151, initio. The counsel for the prisoner can have cognizance (of the procedure) if the judge of instruction deems that this communication is compatible with the necessities of the instruction. Nevertheless, in principle, the procedure should be placed at the disposal of the counsel before each question is put to the prisoner."

the testimony of witnesses, the examination of the accused. This is the real problem.

#### PRESENT LEGISLATION.

*Preliminary summary.*—An infraction of the penal law may at the same time injure an individual. Thus two suits result—one, the public suit, with the object of inflicting the punishment; the other the civil suit, which may be brought by the injured party, having for object to repair the damage. For the moment we will not consider the civil suit.

The code of 1808 comprises two books. (1) On judicial police, and on the officers thereof (judicial police and preliminary examination, in the plan of reform); (2) on courts of justice. In other words, if we eliminate or transpose certain expressions, the outline of the penal process, in its two successive stages, consists of preliminary examination and final trial.

The Penal Code is composed of a division of infractions classified according to their increasing gravity, as: Trespasses (contraventions); misdemeanors (*délits*) and crimes (crimes). A similar classification of jurisdictions is found in the procedure.

The preliminary examination is necessary in criminal affairs. It is optional only in correctional matters (misdemeanors). The public prosecution, according to circumstances or complications, can summon directly before the tribunal of correctional police (art. 182) or demand an inquiry (art. 47). This examination is conducted by the judge of instruction, one of the members of the first tribunal. According to a law of July 17, 1856, he renders the decision himself on the result of the examination; it is no longer left to the chamber of the council.

The chamber of indictment (*mises en accusation*), one of the chambers of the court of appeal, has superior control of the examination. It has charge of the appeals from the decisions of the judge of instruction, under the conditions provided in article 135, and of the transference of the case, which is obligatory when the act is considered a crime. This chamber alone has power to indict the prisoner before the court of assizes.

The jurisdictions in the final trial are, in common law, as follows:

1. The code of criminal instruction established in simple police matters (contraventions) a sort of cooperation between the justice of the peace of the township and the mayor of the commune. (Arts. 139, 140, 166.) The mayor, however, has the right to issue police orders in virtue of his own legal power in the commune. He thus, according to his own decrees, tries infractions. Without insisting on a difficulty which is more theoretical than practical—since mayors rarely took advantage of this judicial authority—we will simply say that since the law of January 27, 1873, the justice of the peace is the only judge of trespasses (contraventions). Appeals (when they are admissible—art. 172) are to the tribunal of correctional police.

2. In every district, the first civil tribunal is also the tribunal of correctional police when misdemeanors (*délits*) are tried. Appeal is taken to the chamber of appeals from correctional police tribunals—(art. 201, amended by the law of June 13, 1856).

3. The court of assizes, with the jury, has authority in criminal affairs. In the code of 1808 it did not have jurisdiction over all crimes; but it includes now, on the other hand, certain misdemeanors. We will return to this point later. From the verdicts of the jury and the decrees of the court no appeal can be taken.

The penal process may be begun: (1) By direct summons before the proper tribunal, in case of misdemeanors or trespasses; (2) by preliminary examination, which, as we have said, is imposed by the law in criminal matters.<sup>1</sup>

The court of cassation maintains the unity of the interpretation and the application of law; it governs our entire organization of justice, civil and criminal, both the examination and the trial.

#### PUBLIC ACTION AND CIVIL ACTION.

Action to impose punishment, and action for reparation of injury, are theoretically independent. The first, in spite of the misleading expression in the first article, belongs to society, and not to the functionaries who have charge of its enforcement; they are merely instruments of society. The civil suit is the prerogative of all those who have suffered from a crime, a misdemeanor, or a trespass. They have every legal right to avail themselves of it for their private interests; they can renounce it, or effect a compromise; but such an arrangement does not prevent the action of the public prosecution (art. 2046, Civil Code); the renunciation of the civil action can not stop or interfere with the public action (art. 4, Code of Criminal Instruction).

*Civil action—Authority of penal tribunals.*—Civil suit is brought, at the choice of the interested party, either before the penal tribunals or before the civil tribunals.

It may be brought before the penal tribunals, but only "at the same time with public action." (Art. 3.) This does not mean that it should be brought at the same moment, but that the criminal tribunals have authority in civil matters only to the extent and during the time that the question of punishment is brought before them. It may be asked how this alliance between the two procedures can be effected. Let us suppose that the public prosecution has brought action before the penal tribunal, and that the injured party has appeared to demand damages, either through a complaint filed before the prosecution is begun or by action taken during the course of the case—even near the close of the trial. This is what is called constituting the civil party. It should be noted that it does not necessarily result from the complaint ("plaintiffs are not considered civil parties if they do not so formally declare themselves") and that it can be made during the process without a preliminary complaint. These two rules were taken from the ordinance of 1670.

Thus the private party really brings support to the public party; although guided by personal interest, he at least acts and pleads in the same way as the representative of society. Both, by demanding reparation or punishment, affirm the guilt of the prisoner. But expense may be incurred. Read article 157 of the decree of June 18, 1811, on the general rate of charges: "Those who constitute themselves civil

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<sup>1</sup> Those brought under penal process in France are generally designated as follows:

*Inculpé:* The individual, whether imprisoned or free, who is subject to a preliminary examination. However, the word *prévenu* is often employed in the same sense.

*Prévenu:* The individual who is to be judged by the tribunal of correctional police, whether after a preliminary examination or on a direct summons.

*Accusé:* The individual whom the chamber of indictment has indicted for trial before the court of assizes.

parties, whether they lose or not, will be held liable to the expenses of the examination, copy, and notice of sentence, but they have recourse to the prisoners (*prévenus ou accusés*) who are condemned, and against the persons civilly responsible for the offense." If the delinquent happens to be insolvent, the public treasury loses nothing, but the injured party derives only this benefit from making himself a civil party—that he is liable for the costs of the process. Article 368 of the Code of Criminal Instruction, amended in 1832, grants better conditions to matters which come under the jurisdiction of the court of assizes; the civil party is held responsible for the costs only in case of failure. But without entering into discussion of the provision itself it must be admitted that it has been rigidly interpreted.

The court of assizes, differing from tribunals of simple or correctional police, has civil action brought before it even when the act is not punishable (on account of acquittal or absolution); that is, when it has been proven that there was no infraction. (Art. 366.) Now, jurisprudence decides that if the civil party obtains damages against an accused who is acquitted or absolved, the civil party loses—although he has won in his own behalf—because he is associated with the public prosecution, and he is held responsible for costs.

Such conditions do not encourage individuals to lend imprudent cooperation to the action of society, or to take advantage of the initiative of the public prosecution in order to obtain the reparation due them.

*Civil action before civil tribunals.*—The person injured by the offense has another course—he can bring action before the civil tribunals. The latter have authority in private suits and can decide the damage caused by an offense, whether the latter is amenable also to penal tribunals, or whether, not being provided for by penal laws, it is under the sole jurisdiction of civil tribunals and is sanctioned only by the indemnity of prejudice. There are two principal cases to be considered:

1. When the civil tribunal before which action has been brought by the plaintiff has rendered its decision before public suit has been instituted. This is the simplest case. The procedure is entirely independent of the possible criminal process. The civil tribunal need not consider the question of punishment, which has not yet been raised and which perhaps will not be raised. If after the affair is ended the public prosecution brings suit before a penal tribunal, the sentence of the latter will not affect the previous decision of the civil court. A lack of harmony and even a contradiction may result from these two sentences, given by different judges. The second case may be more important, but it was not brought up soon enough to change the first.

2. When action is brought before the civil tribunal for reparation of injury, and public action is also begun, the two procedures are contemporaneous, but no longer independent. The civil suit "is suspended until decision is rendered on the public action brought before or during the prosecution of the civil suit." (Art. 3, sec. 2.) The civil tribunal must wait. The criminal jurisdiction suspends the civil. By this method the law prevents a previous decision (one which may perhaps grant indemnity) having undue weight in the deliberations of the penal tribunal. The latter is, of course, not bound by the opinion of civil judges. It is free in law, but it might perhaps be influenced by a preceding sentence. It is desirable that the more important suit, that which more directly concerns the interest and the honor of the prisoner, should, as far as possible, be free from all judicial bias and from all extraneous influence.

Thus there is no longer the danger of contradictory decisions, as in the first instance. After several classical controversies (which to-day we can judge without being unduly impressed by the names of such jurists as Merlin and Toullier) it is unanimously conceded that the criminal sentence has precedence of the civil tribunal. The latter can estimate the offense and the damage; it may, if necessary, decide all the difficulties connected therewith; it has, in short, entire liberty of examination; but it must accept the decision of the penal tribunal as to the existence of the illegal action and as to the guilt of the person under trial. According to a formula often used in pronouncing sentence, it must decide nothing irreconcilable with what has been determined by the criminal jurisdiction.

*The public prosecution in penal matters.*—The magistrates who have charge of public action are, in common law, as follows: In each court of appeal an attorney-general (*procureur-général*), public attorneys (*avocats généraux*), substitutes for the attorney-general, the number varying according to the importance of the court (see law of August 30, 1883, on the reform of the judicial organization); in each district a government attorney (*procureur de la République*), with or without substitutes, according to the importance of the tribunal. (There is no special magistrate to act in this capacity before each justice of the peace; but article 144, amended by the law of January 27, 1873, designates several persons, especially the commissary of police, to act for the government in case of trespasses.)

These various officials constitute an organization of which the minister of justice is the common head, although he is not himself part of the system; the attorneys-general, the public attorneys, the substitutes for the attorney-general, the government attorneys and their substitutes are direct agents of the public prosecution. They may be removed, and are under the authority of the minister. This system insures unity of administration and prevents carelessness. Article 274 shows how an order issued by the head controls and stimulates the exercise of public action everywhere: "The attorney-general, either officially or by order of the minister of justice, charges the government attorney to prosecute offenses of which he has cognizance."

But it is obvious that the attorney-general and the government attorney have no need of an order before they can perform their duty; the very words that we have quoted imply as much for the attorney-general, who can take the initiative in a prosecution. Article 22 is no less explicit: "The government attorneys are charged with the investigation and prosecution of offenses in which tribunals of correctional police or courts of assizes have jurisdiction." As the jurists say, a distinction must be made between the order of the superior and the actual duties of the office. The law has enacted in a general way that it is the duty of the attorney-general and of the government attorney to institute public action. It is not the order received in each particular case that gives him the right to act. Such an order may arouse his zeal, and he obeys as a subordinate; but when he brings suit it is in virtue of the legal power that is invested in him. This distinction, which may appear slight, is not unimportant in practice; it may be of use to consult a superior, but it is never necessary to await his answer. The system of dependence may actuate and guide prosecutions, but if a case is urgent it does not act as an impediment. To take an extreme instance, suppose a procedure is begun contrary to orders. The government attorney might be removed for such an act of independence; but the action would necessarily take its course before the tribunal, for it had been begun by an

official in authority, perhaps too stubborn, but invested with a power which instructions to the contrary can not suppress, and the removal or resignation of the official can nullify this power only so far as his actions in the future are concerned.

Besides, this power is not granted to all the magistrates of the public prosecution. It serves a useful purpose, but it is strictly limited by the system. It would become a source of confusion if it belonged not only to the principal attorneys, but also to their substitutes. In the terms of article 42 of the decree of July 6, 1810, "All the functions of the Government are specially and personally confided to our attorneys-general. Public attorneys and their substitutes can only take part in the exercise of these functions under the direction of the attorneys-general."<sup>1</sup> The differences between this article and other provisions are embodied in a theoretical distinction. Leaving out some of the debated points, the power to prosecute is granted by the law only to the attorney-general in the jurisdiction of the court, and to the Government attorney (*procureur de la République*) in the jurisdiction of the tribunal. The public attorneys (*avocats généraux*), the substitutes for the attorney-general, the substitutes for the Government attorney, do not directly receive authority in penal matters, but are the representatives of their immediate superior.

There is a principle which facilitates the exercise of this function and affirms its unity: The public prosecution is indivisible. The substitutes, let us say, act as the representatives of their superior; but they need no special warrant. Unless there is a formal disavowal, the authorization is understood. Thus, in the jurisdiction of each court or tribunal, the public prosecution is a sort of personified morality, with one of its members as its constant representative.

We will end this review, necessarily too short, of the public prosecution, by recalling the old maxim of the independence of speech: The pen is enslaved, the word is free. The pen serves in bringing action, in demanding investigation or examination of the case. The word is free in the opinion expressed in the hearing. This maxim is not only a tribute to the rights of conscience; it is essential in the administration of justice. The public prosecution can not desist from public actions; it has no right to discontinue a procedure once begun. When action is brought before a court, the latter must render a decision. But when the trial and the evidence prove the absence of guilt in the prisoner, it can at least demand a favorable decision and an acquittal. Judicial annals contain such precedents, and the public prosecution does not hesitate, after having brought suit, to declare the innocence of those who were considered guilty.

To sum up: The judicial system promotes vigilance and maintains unity of purpose in prosecutions; the independence granted the individual members insures their sincerity. In this powerful organization the position of the attorney-general before the court of appeal is most important. The government attorney, who has also authority to take the initiative in actions (art. 22, *supra*), may act as a substitute for, and under the direction of, the attorney-general. (Art. 43, law of April 20, 1810.) The attorney-general has authority over all officials of the public prosecution and all officers of the judicial police. (Art. 45, law of April 20, 1810; art. 17, sec. 2, law of August 30, 1883; art. 279, *Code of Criminal Instruction*.) He has special charge of

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<sup>1</sup> See also in case of absence or inability to serve of the principal attorney, art. 26, *Code of Criminal Instruction*; art. 47, law of April 20, 1810, etc.

public suits and may exercise this function in person, or may cause it to be exercised. (Arts. 27, 274; 252, 284; 135, sec. 8; 202, sec. 5.) He should have cognizance of all infractions. (Arts. 249, 250, 275.) The minister, who has not himself the right of prosecution, sees and governs the matter through this agent. In short, he is the mainspring of penal action, and of the discipline of those who exercise it in the jurisdiction in each court.

It is not necessary to insist further on the important part played by the public prosecution in maintaining order. It is said that the absence of such a system, or the lack of success of the plans to establish it in England, is due to the fear of increasing the powers of the Crown to the detriment of political freedom; but this question is not apropos to our review.

The magistrates of the public prosecution are dependent upon the Government; the latter is responsible to the country for negligence that may endanger safety or for inequalities or favoritism in prosecuting offenses. They are independent both of the tribunals in which they appear and of the parties injured by the infraction. Does it follow that there is no judicial surveillance over public actions, or that individuals have no rights?

*Courts and tribunals and public actions.*—Parliaments under the old régime claimed the right of reprimanding and enjoining the attorneys-general and the royal prosecutors. They insisted, also, that "every judge is an attorney-general" and has the right, if the public prosecution fails to act, to put the penal procedure in movement. In the modern system these theories are rejected and the prerogatives of the two classes of officials are divided. The right to bring action has been assigned to the representatives of the public prosecution; the decision, when action has been instituted, to the judges.

It is evidently inconsistent to confide to the same person both the initiative of the prosecution and the right to pronounce sentence. However wise the magistrate may be, the fact that he prosecutes alone predisposes him to find the prisoner guilty. In our law judges are not allowed to officially institute penal suit.

On the other hand, to grant the judiciary the right to control or reprimand the officials of the public prosecution would doubly restrict the liberty of the latter and expose them to conflicts between the instruction from the head of the system and the censure of the court. For this reason tribunals have no disciplinary authority over the public prosecutors; they can only inform the superior in office. (Art. 61, law of April 20, 1810.)

But it must not be inferred from this division of prerogatives that the two classes of officials are indifferent to each other's functions. If a delinquent should go unpunished through voluntary inaction of the competent authorities, would the tribunals be condemned to silence, waiting in vain for a prosecution which they could not themselves institute? Such was the idea of the Senate in passing the provisions of 1882; public action is to be left to the discretion of the public prosecution, that is to say, practically, of the Government, excepting its responsibility to the Chambers. The proposed annulment of article 11 of the law of April 20, 1810, or the new wording of article 235 of the code (art. 217 of the Senate plan) can not be otherwise interpreted; nor does the discussion leave it in doubt. These two articles, nevertheless, do not aim to lessen Government prerogatives; at least such was the opinion of Napoleon when the Code of Criminal Instruction was prepared: "If the public prosecution neglects its duty, the crim-

inal court must be able to order it to prosecute." The articles read thus: (1) "The court of appeal may, all the chambers assembled, hear the denunciation of crimes and misdemeanors made by one of its members; it can summon the attorney-general, to enjoin him to prosecute in view of the facts, or to hear the report which the attorney-general shall make of prosecutions which have been begun." (Art. 11, law of April 20, 1810).<sup>1</sup> (2) "In all affairs, courts of appeal, until they have decided that there is cause to indict (it is a question here of the Chamber of indictment, before which the case has been laid, and not of the assembled chambers) can officially, whether examination has been begun by the preliminary judges or not, order prosecution, have evidence brought, investigate or cause investigation, and ordain as they shall see cause." (Art. 235 of the Code of Criminal Instruction).<sup>2</sup> These provisions have occasioned legal controversy. They are not as definite as might be wished. The first has never really been applied. (Decree of the court of appeal of Paris, August 18, 1826; decree of the court of appeal of Colmar of June 17, 1861, revoked by the decree of the court of cassation of July 12, 1861.) These are the most prominent instances of judicial surveillance of public action, and we should have so entitled them. Retained in our law with better wording, these articles would insure in the judicial organization better cooperation between examination and prosecution—apart from parliamentary interpellations and responsibility.

*Individuals and public actions.*—Persons not injured by an offense, who evidently have no right to bring civil suit, have also no right to institute public action. The code admits neither the popular accusation (strictly speaking) nor the civic denunciation, which amounted to about the same in the legislation of 1791. The third party can denounce to authority facts of which he has cognizance, but this denunciation does not entail penal procedure. The Government attorney, on receiving the information, decides if there is cause to take action and takes no account of inadvertent proceedings. If he does not act, the denouncer can not take his place and lay the matter before the examining judge or the courts of trial. Rash denunciations involve the civil responsibility of the person who makes them; he can be sued for damages. (Compare arts. 358, 359.) The Penal Code (art. 373) punishes calumnious denunciations with imprisonment and fine.

Persons injured by an offense can bring complaint before the Gov-

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<sup>1</sup> This article was suppressed in the Senate plan of 1882. Art. 219 of the Government plan, 1879, and art. 230 of the plan of the commission of the Chamber, 1891, are as follows: "The court, all chambers assembled, can, on the denunciation of one of its members, and after having heard the attorney-general, order prosecution. In this case the matter is laid before the Chamber of bringing up for trial."

<sup>2</sup> Art. 217 of the Senate plan, 1882: "When the accusation or indictment is brought before the Chamber of bringing up for trial, the attorney-general can demand, and the court can on this demand, order, that he shall be informed in regard to facts or persons not included in the requisitions of the public prosecution before the examining judge. \* \* \* On the demand of the attorney-general, the Chamber can call up prosecutions begun by the examining judge, or cause an examination not yet begun to be proceeded with."

Art. 224 of the plan of the commission of the Chamber, 1891 (the same as the Government plan): "When the accusation or indictment is laid before the Chamber, it can officially order that he shall be informed in regard to facts or persons not included in the requisitions of the public prosecution before the examining judge. \* \* \* On the demand of the attorney-general, the Chamber can call up prosecutions begun by the examining judge, or cause an examination not yet begun to be proceeded with."

ernment attorney, before the officers of the judicial police whom the law assigns as his auxiliaries, before the attorney-general, or before the examining judge. There is no difference in principle between this complaint and the denunciation of the third party, and similar responsibility is involved. Neither is necessary in instituting public suit; neither constrains the public prosecution to bring action. The two rules are as follows:

1. The public administration can prosecute without complaint having been entered. Action to cause punishment is independent of civil action and of personal claims. The injured person can control his own rights; he can exact reparation; he can compromise or pardon; he can remain silent. It is the duty of the public prosecution in any case to protect social order. It can take valid action without outside instigation; such may be its duty; such is certainly its right. Only in a few special cases are there formal provisions to the contrary—when it is thought there would be abuse of privilege, or useless zeal to punish an offense which the victim would prefer to conceal, and to cause a discussion against his will. In these cases there must be a preliminary complaint before penal action is taken. Sometimes the very withdrawal of the plaintiff from the case will stop a prosecution which has been begun (arts. 336 and 339 of the Penal Code for adultery; art. 60, law on the press of July 29, 1881, for defamation and injury).<sup>1</sup>

2. On the other hand, the complaint of the injured party does not make prosecution obligatory upon the public prosecution. It may be carelessly made, without sufficient cause and without proof. Besides, to bring complaint is not to ask for damages; it is simply a denunciation under another name of an infraction or its supposed author to the competent officials. The latter, having been thus informed, as they might have been in another way, will decide what is best to do in the matter.

But if a legitimate complaint is not heard, must the plaintiff resign himself? Will he be helpless if the Government attorney arbitrarily determines not to prosecute? It is true that the injured party, no matter how indifferent the public prosecution may be, always has the right to bring suit for damages before civil tribunals. But can he bring such action before penal tribunals? We know that the latter have authority over civil actions as accessories to public actions. We must see if the interested party, profiting by this accessory legal authority, could not (on his own civil or even penal responsibility) himself bring public action and supply the absence of the public prosecution. In other words, besides the authority conferred upon the appointed magistrates, is there any right to bring private accusations? Here distinctions must be made.

The victim of an offense has the right of direct summons in matters relating to misdemeanors and trespasses (*délits et contraventions*). He can summon the accused before the tribunal of correctional police or before the police judge (arts. 145, 182). Only, to insure correct

<sup>1</sup> Art. 5, sec. 4, of the Code of Criminal Instruction, amended by the law of June 27, 1866: "In case of misdemeanor (*délit*) committed (by a French citizen abroad) against an individual, French or foreign, prosecution can be brought only at the demand of the public prosecution; it should be preceded by a complaint of the offended party or an official denunciation to French authority by the authority of the country where the offense has been committed." This complaint or denunciation are not necessary in case of crimes committed by French citizens in other countries.

management of the case, the law demands, when action is brought by an individual, that the representative of society shall have surveillance and direction of the matter; especially that he shall formulate such conclusions as he thinks best in regard to the guilt and the proper punishment. To use an approved expression, the victim can give impulse to public action; he can bring the matter before the competent tribunal; but the public prosecution alone has authority over such public action, even when a case has been brought before a tribunal without its participation. It is said that this right of direct summons has been abused. There is no law which may not be carried to excess or may not be perverted from its legitimate object. It can be remedied. Abusive prosecutions can be restricted.

The right of direct citation does not exist in case of crimes; there must be a preliminary examination. This examination, although not legally imposed, may be actually indispensable in case of misdemeanors (*délits*). It is usually the duty of the Government attorney to demand it. Can the person injured by the crime or misdemeanor (*délit*) also claim it and bring the matter before the examining judge, as he can before tribunals of simple or correctional police? Article 63 of the code seems to answer this question: "Any person who claims to be injured by a crime or misdemeanor can bring complaint and make himself a civil party before the examining judge." But the provision has two interpretations. According to one, the judge simply transmits the complaint to the Government attorney, "in order that he may demand action as he shall see cause" (art. 70); and perhaps the affair will be "classified without consequence." The complaint with the self-constitution of the civil party will lead to nothing if the Government attorney does not demand inquiry. According to another system (the one usually taught by criminal authorities), the judge of instruction should, of course, transmit the complaint to the Government attorney, in order that the latter may demand as he shall see cause (for the public prosecution always reserves the right of authority in actions); but the judge must receive the complaint of the civil party, no matter what the opinion of the Government attorney may be, and even if he refuses to prosecute. It is the duty of the judge to examine, to decide according to his conviction; the right of opposition to his ordinances is reserved. (Art. 135.) We think it would be easy to prove that this system is the same as that of preliminary provisions. "When an injured person brings complaint," Cambacérès said, "when he makes himself a civil party, the imperial prosecutor must not be able to paralyze his efforts by a refusal to prosecute; justice desires that the plaintiff in such case shall have the right of recourse to the judge of instruction." Not for the sole purpose, I presume, of having him, as an agent of transmission, communicate to the Government attorney a complaint of which the latter already has cognizance, since he has "classified" it, but in order that the judge may accomplish his function as an examining magistrate. Jurisprudence appears to admit the system and it is applied in practice. (See R. Demogue, *Revue pénitentiaire*, 1900, p. 449.)

In any case the controversy (the details of which we will omit) is not only of a doctrinal character in the present state of the code; it is also legislative. The same discord which we have seen in the matter of judicial surveillance is also apparent when it is a question of individual rights. The judge of instruction can have the case brought before him by the injured party, says one plan. No, says the other; the judge of instruction can have the case laid before him only by the

Government attorney.<sup>1</sup> The point is whether public action shall depend solely on the Government and on the public prosecution, or whether some right of taking the initiative shall be granted either to the court or to the victim.

The plans of reform are important; they include two essential questions in penal procedure: The nature of the examination (whether it shall be inquisitorial or whether the prisoner shall be allowed to contradict, or at least to have some control of the matter; see *suprà* what we have said on the plans of reform), and the rôle of the public prosecution, whether its prerogatives are exclusive, or whether subsidiary cooperation is admitted. The rights of the individual in society are protected in two ways, by means of defense in case he is suspected, by means of prosecution in case he is injured.

#### THE PRELIMINARY EXAMINATION.

*Judicial police.*—The police—that is to say, the State guardians of public order—are classified as administrative and judicial. Administrative police represent the Government itself, in all its capacities, in the measures it takes to make the law respected, and in the anticipation and prevention of infractions. “Judicial police investigate crimes, misdemeanors, and trespasses (crimes, délits et contraventions), collect evidence, and deliver the authors to the tribunals charged with their punishment.” (Art. 8.) In spite of the difference in functions, the transition from one class to the other is sometimes imperceptible. It is natural that the administration, which of course can not prevent all offenses, should at least inform justice; that administration officials should denounce actions of which they have cognizance in the exercise of their functions (art. 29); that some of them should even take an active part in the investigation and verification of the judicial police, in different ways and with different powers. These are matters for the law to decide; and they should be carefully defined in order to avoid both indifference and arbitrary rulings. This is the explanation of the reports presented—sometimes the seizures directed—by agents of the public administration. Also, in the enumeration of article 9,<sup>2</sup> a number of the officials of the judiciary police belong to the administrative organizations as well. This principle is involved in the famous article 10 of the code, the legal import and legislative value of which have been so much discussed, which has been at times invoked as a guaranty of general safety, at times attacked in the name of public liberty and of the necessity of dividing prerogatives: “The prefects of the departments and the prefect of

<sup>1</sup> Art. 42, plan of the commission of the Chamber: “The judge of instruction has the matter brought before him either on demand of the public prosecution or on the complaint of the injured party. This complaint will have effect only when the public prosecution has received notice from the plaintiff and when the latter has declared himself a civil party.” (Conformable, with changes in wording, to the Government plan, 1879, Art. 35.)

Art. 44, Senate plan, 1882: “Except in case of flagrant offense the judge of instruction has the case brought before him only on demand of the Government attorney, with the exception of what is said about commissions to take evidence.”

<sup>2</sup> Judicial police is under the jurisdiction of the courts of appeal (Junge, art. 279 and following); and, according to distinctions which shall be established, its functions will be confided to the keepers of parks, the keepers of forests, the police commissaries, the mayors and their assistants, the Government attorneys and their substitutes, the justices of the peace, the officers of gendarmes, the general commissaries of police (annulled March 28, 1845), and the judges of instruction.

police at Paris can personally perform or require the officers of the judicial police (according to the authority of each) to perform all the work necessary to obtain proof of crimes, misdemeanors, and trespasses, and to deliver the authors thereof to the tribunals." We read, in the introduction to the code, that since the prefect has charge of the administrative police he is better fitted than anyone else to superintend the various branches, to discover and reach the guilty persons. The importance of this article, so far as the punishment is concerned (as well as its political danger), is more apparent if the rule which has been sanctioned by decrees is considered separately: The prefect, who is dependent upon the Government alone, who is not subject to the authority of the courts of appeal, as are the officers of judicial police, has as much power as a judge of instruction. (See especially court of cassation, November 21, 1853.)<sup>1</sup>

The Government attorney and the judge of instruction are superior officials of judiciary police in criminal and correctional matters. We will consider the duty of the judge of instruction presently. The Government attorney (*procureur de la République*) is charged, first, with the investigation, and, second, with the prosecution of crimes and misdemeanors. (Art. 22.) He receives the report, the denunciation, the complaint. (Arts. 18, 20, 29, 30.) The police officials who act as auxiliaries to the Government attorney (justices of the peace, officers of gendarmes, mayors, police commissioners) also receive complaints and denunciations, and transmit the same with all the personal verifications which may be under their jurisdiction. (Arts. 53, 54, 64.) It is to him that all the police investigations, all the information from individuals, all the official reports in each district should come. Thus informed, he can prosecute either by summoning directly to the tribunal of correctional police or by demanding an examination (always in case of a crime; sometimes in case of a misdemeanor).

The examination also, in the larger sense, is part of the system of judicial police, as defined in article 8. It has for its object to collect evidence and to deliver the delinquents to the tribunals charged with their punishment. But it has an independent place, both on account of the redoubtable power which it confers on the instructing magistrate and the importance of the decision with which it closes. The examination is no longer a matter of police; it already has entered into the domain of the criminal justice; the latter desires information before proceeding with the trial. This is why we find the two rôles clearly differentiated: The Government attorney prosecutes, but he can neither collect the evidence nor cause arrests; the judge instructs, but he can not officially bring up a case. In flagrant offenses an exception is made to the above.

*The judge of instruction.*—The judge of instruction is one of the

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<sup>1</sup> Art. 10 is defined and restricted in the Senate plan, 1882: "The prefect of police can perform all the acts which are the prerogatives of the officers of the judicial police, according to title 1, Chap. I of Title III (of flagrant crime and misdemeanor) of the present law, by following the rules and forms which are prescribed. \* \* \* He can require the officers of the judicial police, except the Government attorney and his substitutes and the judge of instruction, to perform, according to the prerogatives of each, all the duties of judicial police."

This article is suppressed in the plan of the commission of the Chamber, 1891, as it had been by the Chamber itself, at its first reading in 1884: "The commission thinks that our criminal justice is strongly enough organized to depend on its own agents alone. The discussions should cease. \* \* \* The prefect of police should be considered one of the superior agents of the administrative police, empowered only to investigate and denounce, and not to verify crimes and offenses." (Report annexed to the account of the meeting of January 15, 1891, No. 1114, p. 20.)

judges of the first tribunal, and as such can not be removed; but he is required to perform this function for three years only, and at the end of this time his powers may be renewed. In spite of doctrinal controversies cases have occurred when his authority was revoked before this term expired. He then remains an ordinary judge.

The judge of instruction of the place where the crime or misdemeanor was committed, the judge of instruction of the prisoner's place of residence, or the one where the prisoner is found, are all equally competent.

His functions are as follows:

1. Until he is required to open an examination he can receive complaints; according to some writers, he can receive even denunciations. He transmits them to the Government attorney. (Art. 70.)
2. When it is demanded (in case of flagrant offense he can act of his own accord) he proceeds with the examination.<sup>1</sup>
3. At the close of the examination he acts as a judge of the result.

We will now consider the procedure of examination and later the result, which is either a decision that there is no cause to prosecute or a decision of transference—when the charges seem to justify, sending the case to tribunals where the guilt is determined.

The examination is divided into collecting evidence and taking measures concerning the person of the prisoner (arrest and preliminary detention, provisional liberation). The collection of evidence comprises the journey to the place where the crime has been committed; the seizure of papers and objects which may serve as evidence; the search at the residence of the prisoner and in all other places where the judge "may presume that there has been hidden" anything useful in the revelation of the truth (art. 88); the investigation; the hearing of witnesses (art. 71 and following), and the questioning.<sup>2</sup>

The judge must examine and review the proofs which tend to show the culpability of the accused and those which are favorable to him. The latter is not present during the conduct of the examination, and especially he is not to be present when the judge hears the witnesses. The judge, however, may order the confrontation of witnesses with the accused. But the law of December 8, 1897, established important rules in the interest of the defense.

At the time of the first appearance before the judge of instruction the latter establishes the identity of the accused, informs him of the acts with which he is charged, and receives his statements or declarations, after having informed him that he is free to decline making them at that time. In addition, he informs him of his right to choose his counsel, or he will have some one designated as his counsel, if the accused asks it.<sup>3</sup> If the accused is imprisoned, he may, immediately

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<sup>1</sup> The plans of reform differ again as to the respective powers of the prosecutor and the judge. Art. 50 of the Senate plan, 1882: "The judge of instruction can examine only in regard to facts and persons that have been the object of the requisition of the Government attorney." Art. 49 of the plan of the commission of the Chamber: "When the matter has been laid before the judge by the public prosecutor, he examines in regard to persons not designated in the requisition, if he finds, during the information, any reason to suspect them."

<sup>2</sup> Plans of reform: Chap. II—Secs. II (journeys, searches, and seizures), III (surveys), IV (hearing of witnesses), VIII (examining of the prisoner and confrontations).

<sup>3</sup> The designation of the advocate, who gives his services gratuitously, is made, not by the judge of instruction, but by the president of the association of advocates. This is important in our judicial usage.

after his first appearance before the judge, communicate always freely with his counsel.

The accused, whether detained or free, can only be examined or confronted in the presence of his counsel. At least, the counsel is summoned in order that he may be present during the interrogatories and the confrontations. The accused may waive the right to have his counsel present.

The counsel, when he is present at the questioning and the confrontation, can only take part after he has been authorized by the judge of instruction. If the judge refuses the authorization, the fact may be mentioned in the record.

The proceedings are to be placed at the disposition of the counsel the day before each one of the questionings, that he may take knowledge of the fact. Every order of the judge must immediately be communicated to the counsel of the accused.

Thus the advocate, of which the code of criminal instruction never spoke during the examination, has now a rôle of protection and of guardianship in the interest of the accused. As he may know the proceedings by the communications which are made to him the day before the questioning, he may urge the judge—though he can not, strictly, exact it—to make some new inquiry which he believes to be useful for the defense.<sup>1</sup>

The law of December 8, 1897, has still further limited the interdiction as to communication with the accused. A maximum of twenty days must not be exceeded in this interdiction. If all the houses of detention or arrest were organized with the separate cellular system (as is contemplated by the law of June 5, 1875, though not yet put wholly into effect), the interdiction of communication would disappear entirely from our legislation. Indeed, article 8 of the law of December 8, 1897, says:

The final paragraph added by the law of July 14, 1865, as to article 613 of the code of criminal instruction, is abrogated so far as concerns houses of arrest and of detention where the system of separate confinement has been introduced (*régime cellulaire*). In all other cases the judge of instruction shall have the right to prescribe the interdiction of communication for a period of ten days. He may renew it, but only for a new period of ten days. In no case does the interdiction of communication apply to the counsel of the accused.

*Warrants and preliminary detention.*—The warrant to appear and the warrant to bring have one object, that of causing a person to appear before the judge of instruction. But while the first is a simple order to present oneself at a given day and hour, the warrant to bring can be carried out forcibly in case of refusal or resistance. The judge of instruction, even in case of a crime, can only issue at first a warrant to appear. In case it fails, resort is had to the more rigorous method of the warrant to bring. The prisoner who appears on the first of these warrants is examined immediately; on the warrant to bring, within twenty-four hours. (Art. 93 du code et art. 2 de la loi du 8 décembre 1897.)

After the appearance, or in case of flight of the prisoner, when the penalty of imprisonment is applicable, the judge of instruction can issue a warrant to hold in custody or a warrant of arrest (mandat de

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<sup>1</sup> Here may be mentioned among desirable reforms a proposition presented by M. Cruppi in the Chamber of Deputies, in the sessions of December 6, 1898, and June 30, 1899, relative to expert testimony, namely, when expert testimony is ordered, the accused should have the right to choose an expert, who may make investigations with the expert named by the judge of instruction.

dépôt ou mandat d'arrêt). (Art. 94, amended, law of July 14, 1865.) Both of these warrants have for their object the preliminary arrest and detention; they imply the right to use public force against the prisoner who may try to avoid their execution. (Art. 108.) But the difference between the two is worthy of note. The warrant to arrest can be issued only after the Government attorney has been heard. It contains a statement of the fact on account of which it is issued and quotes the provision which declares that this act is a crime or misdemeanor. It is thus subject to certain guaranties as to personal liberty which do not exist with the other, since an individual can be legally arrested and put under lock and key by a warrant to hold in custody, which does not give any reason for such action.

A law of April 4, 1855, authorized the judge to withdraw all warrants to hold in custody during the examination, if the prosecutor consented. The warrant to hold in custody was thus designed by the legislator as a provisional measure, capable of spontaneous revocation. The warrant of arrest was a definite measure of incarceration—definite, of course, until the end of the process, unless provisional liberty should be granted on a demand made under legal conditions. But even this disappeared—and, it must be admitted, to the advantage of the prisoner—in the law of July 14, 1865. The judge can officially withdraw the warrant of arrest as well as the warrant to hold in custody, with the consent of the Government attorney, "on condition that the prisoner shall appear during all the acts of the procedure and for the execution of the sentence as soon as he shall be required." (Art. 94.)

The two warrants have now the same function, apply in similar cases and with an equal force. (The warrant of arrest with additional costs, art. 71, sec. 5, decree of June 18, 1811; art. 6, sec. 2, decree of April 7, 1813.) Practice is consistent in this respect until modifications shall again be made by the plans of reform.<sup>1</sup> It is sometimes said that the warrant to hold in custody is preferably employed against a person who is being questioned (he should know by the examination the cause of his arrest) and the warrant of arrest against a person in flight. Besides, it seems that the warrant to hold in custody sometimes states (although this is not required by law) the fact that is criminated and the legal provision therefor. If this is true, the usage which obviates the theoretical imperfection of a causeless warrant must be approved.

The Government attorney can issue a warrant to hold in custody, as an exception, in cases provided by law. (Art. 100, Code of Criminal Instruction; art. 1, law of May 20, 1863.)

The law of 1865, of which we have already spoken, added a paragraph to article 613:

When the examining judge thinks it his duty to prescribe in regard to a prisoner an interdiction to communicate, he can do this only by an order, which will be inscribed on the prison register. This interdiction can not last more than

<sup>1</sup> Every warrant to hold in custody shall have a reason in fact and in law. (Art. 90, Senate; art. 89, commission of the Chamber.)

The warrant to hold in custody may be issued after the preliminary questioning or the preliminary appearance. It has only a limited effect (detention during fifteen days or ten days), with the possibility of being extended for the same period and unless a warrant of arrest is issued. (Arts. 108-110.)

The warrant of arrest may be issued at the expiration of the warrant to hold in custody or against an accused person who is free, especially in case of flight. The warrant of arrest issued by an ordinance of clôture takes effect until there has been a definite decision. The warrant of arrest issued during the examination is effective during thirty days, with the possibility of one or more extensions. (Arts. 111-119.)

ten days, but it may be renewed. An account of the same will be rendered to the attorney-general.

This seclusion, or interdiction to communicate, when prolonged, was open to abuses. It might be made a method of forcing an avowal—the confession of the prisoner, as the ordinance of 1670 would have expressed it—and in fact in a celebrated case<sup>1</sup> it was legally proven that after long procedures an avowal of guilt had thus been obtained from an innocent person. The law of 1865 wished to remedy this danger of a too inquisitorial practice.

The *maisons d'arrêt* et les *maisons de justice* receive those who are detained for trial. The *maisons de justice* are placed near each court of assize and those are sent there who have been indicted by the chamber of indictment and held for the court of assize.

*Provisional liberation.*—The judge of instruction is never obliged to order preliminary detention. After he has ordered it he can officially, with the consent of the Government attorney, withdraw the warrant during the examination. Otherwise the preliminary detention continues during the examination, during the arguments, and until the decision is finally rendered.<sup>2</sup> This method is modified by the possibility of provisional liberation.

Provisional liberation may be granted in two principal ways: Either it depends wholly on the law, and may be demanded as a right under certain fixed conditions, or it depends on the judge, and is a sort of favor which he decides to confer. The liberal law of July 14, 1865, adopted this method, because it is difficult to positively define cases when liberation could be demanded as a right, and those when it would be legally prohibited. Circumstances may be too varied to be outlined in one formula.<sup>3</sup>

The judge can order, on the demand of the prisoner, in all cases, that he shall be provisionally liberated. (Art. 113 amended.)

This is a sort of incident procedure, which the judge of instruction decides on the demand of the prisoner. The right to consent or contradict is reserved to the public prosecution; the civil party has the right to comment, and the order, when issued, may be opposed before the Chamber of indictment. (Art. 135.) The prisoner may be required to furnish security. The demand for liberation is admissible not only during the inquiry, but also as long as the preliminary detention lasts in any stage of the case. It is then decided by the court before which the process has been brought. (Art. 116.)

The provisional liberation ceases (1) when another warrant is issued on account of newly discovered and serious circumstances, or when the prisoner fails to appear (art. 115, 125); (2) when the Cham-

<sup>1</sup> Art. 1, law of June 5, 1875: "The prisoners and accused (inculpés, prévenus et accusés) will be in future individually separated during day and night." The slowness of the reconstruction of prison systems to accomplish this object is well known. Also, decree governing prisons for short penalties, where the imprisonment is in common (jails, houses of correction) of November 11, 1885, art. 27. "Those who are held in custody, the accused and prisoners (détenus, prévenus, accusés et condamnés), are separated according to the class to which they belong. The prisoners and the accused (prévenus et accusés) who are in prison for the first time will be as soon as possible isolated from the old offenders."

See arts. 129 (amended, law of July 17, 1856), 131, 206 (amended, law of July 14, 1865).

<sup>2</sup> Affaire Doize, 1861. Voir Sirey, Lois annotées, 1867, p. 93.

<sup>3</sup> As an exception, in correctional matters, liberation is a right five days after the questioning (in cases when the maximum of the penalty is less than two years) if the prisoner resides in the place and has not been previously condemned for crime or for misdemeanor to an imprisonment of more than a year.

ber of indictment issues a writ of arrest on the ground that crime exists and indicts before the court of assizes (art. 126).<sup>1</sup>

*Deduction of preliminary detention.*—Preliminary detention is not a penalty, but a necessary measure in the penal procedure. It nevertheless weighs heavily upon the prisoner. It resembles an actual punishment so closely that equity demands that account should be taken of it. Until now the law has given no reparation to those who were subjected to this detention without reason; that is, who had committed no offense which could be attributed to them. They are the victims of accidental circumstances, for which justice is certainly not responsible, but the judicial investigation of which has caused temporary loss of liberty to the individual. Recent propositions to grant damages in certain cases resulting in an acquittal or in a decision that there is no reason to prosecute have been unsuccessful.<sup>2</sup> It is to be regretted, although the objections are serious and the practical difficulties great. When the case results in condemnation, the law of November 15, 1892, decides that the preliminary detention is, theoretically, included in the duration of the penalty. This was admitted by the Penal Code under no circumstances, and was accepted by the legislation of 1832 only under restricted conditions, as a simple deduction from the imprisonment.

Article 24 of the Penal Code is thus amended: "When there is preliminary detention, this detention will be deducted as a whole from the duration of the penalty enacted by the sentence, unless the judge has made a special order, with a stated reason, that this deduction shall not take place or that it shall take place only in part. Preliminary detention between the date when the sentence is pronounced and that when it becomes irrevocable, will always be deducted in the two following cases: (1) If the prisoner (*condamné*) has not appealed from the sentence; (2) if his punishment has been diminished on appeal or petition (*pourvoi*). (Law of November 15, 1892)."<sup>3</sup>

*Flagrant offense.*—The treatment of flagrant offenses, by the Code of Criminal Instruction, is explained by the probability of the evidence, sometimes by actual proof of the act. It is a modification of the principles that we have up to this time observed.

1. It deviates from the principle of separating the prerogatives of instruction and prosecution, in virtue of which the government attorney does not examine, but should require the judge to open the examination. (Art. 47.) This principle was brought out in the discussion of the code. With an energy which was surprising even at that epoch it was pointed out how dangerous and compromising to the safety of citizens it would be to grant at the same time the right to accuse and the power to receive the evidence which justified the accusation; to grant "to an officer whose commission could be

<sup>1</sup> See, however, article 11, law of December 8, 1897: "When the court of assizes, before which a criminal case had been brought, declares that the consideration thereof shall be postponed to another session, it is their duty to enact in regard to the liberation of the accused."

<sup>2</sup> After interesting discussions, the legislator admitted damages only in the case of judicial errors. See law of January 8, 1895.

<sup>3</sup> Original article 24 of the Penal Code (amended by the law of April 28, 1832): "When sentences of imprisonment are pronounced against persons who are held in preliminary detention, the duration of the penalty, if the prisoner has not appealed, will count from the day of the sentence, notwithstanding the appeal or the petition of the public prosecution, and whatever may be the result of this appeal or petition. It is the same in cases when the penalty is reduced on appeal or petition of the prisoner."

revoked, and who is subject to the Attorney-General," jurisdiction over the persons whom he was prosecuting. This objection was finally passed over, but only in case of flagrant crime; it is true that the expression is not taken in a narrow sense, "the offense which has just been committed is a flagrant offense. When the prisoner is pursued with hue and cry, and when he is found, about the time that the offense is committed, in possession of effects, arms, instruments, or papers which lead to the belief that he is the author or an accomplice, the offense shall be considered flagrant." (Art. 41.) "The prerogatives ascribed to the government attorney in case of flagrant crime will also be applicable in every case when a crime or misdemeanor, even when the latter is not flagrant, is committed within a house and the head of the house requires the government attorney to take such action." (Art. 46.)

The judge of instruction brings up the case officially (art. 59), or else the government attorney begins the examination himself (art. 32 and following). He causes the persons against whom there are serious charges to be arrested; by verbal order if they are present, otherwise by the warrant to bring. (Art. 40.) The mistrust with which the reports of the imperial prosecutor were regarded at the time of the preparation of the code, the objections upon which we have commented, were embodied in two interesting provisions; one creates a control, the other hastens, as soon as it is possible, to reestablish common law. The law intended that the acts of instruction performed by the prosecutor should be under supervision, and should be of a provisional nature. They are subject to supervision, since his report (art. 42) is drawn up in presence of and signed by the commissary of police, the mayor, his aid, or by two citizens resident in the district, unless it is possible to secure witnesses "immediately." It is provisional, because the prosecutor transmits at once the report to the judge of instruction, as well as the articles seized, in order that the judge may examine under the usual conditions, and that he may repeat any part of the process which may not seem complete. (Arts. 45, 60.)

These prerogatives do not belong to the government attorney alone, but also to the officers of judicial police who act as his auxiliaries, (justices of the peace, officers of the gendarmes, commissaries of police, mayors). When all the cases of flagrant crime are enumerated, and when it is remembered that a certain number of functionaries in every part of the district have these prerogatives, it is easy to understand why so many examinations of flagrant crime are begun. The desire of the legislator appears to be this: Everywhere there shall be an officer of judicial police, competent to open at once a preliminary examination, summary and provisional. If there is cause, a second examination will be held later—the examination, properly speaking. This is conducted only by the judge of instruction, an independent magistrate; the first can be in charge of other agents, who may have authority to maintain public order, even when their commissions are revocable.

2. While as a general rule a person who is sought can not be arrested except by a warrant from the judge of instruction, "every public agent and every person is obliged to seize the prisoner (*prévenu*) surprised in flagrant offense, or accused by hue and cry, or taken in a case similar to flagrant offense, and conduct him to the government attorney, without the need of a warrant, if the offense entails a criminal penalty. (Art. 106; compare with the same expres-

sions, art. 32, analyzed in the preceding paragraph.) Practice, going much further, extended this seizure of the accused without a warrant even to offenses which involved only correctional punishment. This was probably necessary; but although such action is legal in certain cases provided for by other articles (art. 16 of the Code of Criminal Instruction; art. 163 of the Code on Forestry), it was not founded on the general text. A law of May 20, 1863, on the examination of flagrant misdemeanors before correctional tribunals, seems to have sanctioned an action that until then might have been criticised from a judicial standpoint. It supposes—and thus authorizes—the arrest of an individual found in flagrant misdemeanor (*délit*) when the act is punishable with imprisonment. He is to be taken before the government attorney.

This same law of 1863 also simplifies the procedure in the case now under consideration, by granting the government attorney new powers. The latter questions the person arrested, and can arraign him at once before the correctional tribunal; or if there is no audience, during the audience on the following day. (The ordinary delay in summons would be at least three days. Art. 184.) He then has the right to issue the warrant to hold in custody. The tribunal can postpone the case to one of the next meetings, in order to obtain more information; and the prisoner can demand a delay of three days in order to prepare his defense.

Whatever advantages this short procedure may have, it would obviously be too rapid under some conditions. (Compare art. 7, law of May 20, 1863.) Its use is prohibited when the prosecution is of a nature to entail relegation. (Art. 11, law of May 27, 1885.) It is no longer applied in Paris in case of minors under 16 years. This usage is excellent, and is now universally practiced. Affairs concerning minors are even habitually submitted to a preliminary examination.

The judge of instruction may interrogate and confront the person suspected without following the rules prescribed by the law of December 8, 1897, if he has been transported to the place where the offense was committed in case of flagrant offense, or if the urgency comes from the state of a witness in danger of death, or from the existence of indications about to disappear.

*Closing of the examination—Chamber of indictment.*—It would have been rational, after having separated the functions of prosecution and examination, to also separate in the examination itself the acts of inquiry and the decision on the result. A judge should report to the chamber of the council and the latter should decide. But practice was not in accord with this theoretical conception. The chamber of the council was composed of three judges, comprising the judge of instruction. (Original art. 127.) Experience showed, as might have been foreseen, that his report and his opinion influenced his colleagues. Besides, only one voice was necessary to cause the transference of an act which might have been considered a crime to the chamber of indictment. (Original art. 133.)

The law of July 17, 1856, destroyed this distinction of prerogatives, which really was hardly more than a form. The judge of instruction, after having made inquiry, himself decides on the result.<sup>1</sup> When the

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<sup>1</sup> The plans of reform again grant jurisdiction to the chamber of the council. (Title II, Chap. II, Sec. XII.) But (1) it is composed of three judges, and the judge who has examined can never take part in the deliberations; (2) it is not the duty of the court to decide on the results of the inquiry. It has direct authority over certain important questions (interdiction to communicate for a second period of ten days—art. 123, fine, plan of the commission of the Chamber; provisional liber-

procedure is finished, and he has communicated it to the government attorney, who shall make requisitions of him (amended art. 127), he issues an ordinance of cloture, and decrees:

That there is no cause to prosecute, if he thinks that the act does not constitute a crime, a misdemeanor, or a trespass, or that there are no charges against the prisoner.

That the case shall be transferred to another jurisdiction. If he thinks that the act constitutes a trespass, it is sent to the tribunal of simple police; if a misdemeanor, to the tribunal of correctional police.

Finally, if he thinks the act constitutes a crime, he orders the transmission of the details of the examination to the chamber of indictment. (Art. 133.)

The chamber of indictment is then obliged to take cognizance of the case; but it is also competent in appeals (oppositions) from the various ordinances of the judge of instruction.<sup>1</sup> This right of opposition belongs to the government attorney, to the attorney-general, even to the civil party whenever he claims injury to his civil interests, but not to the prisoner, unless his demand for provisional liberty is refused, or it is alleged that the judge of instruction is incompetent. (Art. 135, 539.)

We will especially consider the examination transmitted to the chamber of indictment in an act which is considered a crime. It takes action on the evidence without oral debate in a session which is not open to the public. Nevertheless, in the terms of article 217 the civil party and the prisoner (*prévenu*) can submit a statement,<sup>2</sup> but neither themselves nor their counsel can be present.

The chamber of indictment issues a decree that there is no cause for trial, or a decree of transference to the tribunals of simple or correctional police, or to the court of assizes. In this last case the decree contains a writ of arrest, and the accused is transferred to the house of justice established nearest the court of assizes before which he is taken. (Arts. 232, 233.)

The prisoner (*prévenu*) in whose case a decision of lack of cause (*nonlieu*) is rendered is set at liberty. He can be prosecuted the second time if new charges arise—such, for instance, as the subse-

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ation—art. 126). It has special authority in appeals from the ordinances of the judge during the examination. In this way the tribunal regulates and guarantees the rights to contradict and to control which are introduced by the plans, especially; “the public prosecution, the civil party and the prisoner, can require the judge of instruction to take all measures which they think necessary to the discovery of the truth, and on his refusal, the reason for which must be stated in his decree, they have the right to bring the matter before the chamber of the council.” (Art. 51 or 50.)

Whatever may be the intrinsic value of the system, an entire change in our judicial organization would be necessary in order to grant the chamber of the council jurisdiction over even the examination. The majority of tribunals have a very limited number of judges, who preside usually over affairs of all sorts. The judges in the chamber of the council could thus decide that the affair should be sent to the tribunal of correctional police; that is, to their own body. When the time came for the hearing they would doubtless not have a settled conviction, but there would exist a prejudice, which it is best to avoid.

<sup>1</sup> One section of the court of appeal, especially designed for this purpose, is charged with the duty of decreeing: (1) In regard to bringing up prisoners (*prévenus*) for trial for actions punishable with criminal penalties; (2) in regard to appeals brought in cases provided by the law from the ordinances of the judges of instruction and from the sentences of the chamber of the council. (Title IV of the plans of reform.)

<sup>2</sup> The plans of reform of which we have spoken and a proposition more recent, voted by the Chamber of Deputies June 9, 1899, declare, on the contrary, that the counsel of the prosecution and of the prisoner may attend the hearing and present summary observations.

quent declaration of a witness revealing evidence which was unknown or of a nature to strengthen the proof which had been considered insufficient by the judge. (Art. 246 and following.) The decree of lack of cause is not irrevocable—it is only provisional—until public action is proscribed by limitation of time. (Arts. 637, 638.) Justice, which had been arrested for insufficiency of proof, takes its course again if the evidence is found. But if the examination establishes unquestionable proof of innocence, should the person who has been wrongly accused and has, perhaps, been detained for a long time, receive nothing more than this statement of lack of cause, which leaves room for doubt? In such cases, rare but important, society should affirm the honor of those whom she sets at liberty.

#### THE TRIAL.

1. *General principles.*—The procedure is public, except in special cases, when privacy may be ordered.<sup>1</sup> The sentences or decrees are always pronounced in public. The trial is never kept secret from the interested party and his attorney. All the provisions of the law confirm the right of the prisoner to be heard. He is granted, for instance—

1. The right to be assisted by counsel. The body of advocates grant aid to indigent prisoners;<sup>2</sup> the assistance of an attorney is actually imposed in the most serious cases. (Art. 294, Code of Criminal Instruction; art. 11, law of May 27, 1885, on relegation.)

2. The right of free defense, and of pleading. He can present evidence, call witnesses in his own behalf, dispute the opposing testimony, refute the arguments of the public prosecution. The prisoner or his attorney is always entitled to the last appeal. Formerly, in the court of assizes, the president, after the pleadings were closed, made a summary of the matter in the interest of lucidity, bringing to the attention of the jury the chief points of the evidence for and against the prisoner. The criticism was made that it was impossible for the president always to be neutral; that he sometimes allowed himself to be influenced against the accused, and that his summary was merely a repetition of the prosecutor's address to the jury, delivered, also, at a time when further refutation was not admitted. This résumé of the president is now prohibited, in the interests of the defense. (Art. 336, amended by the law of June 19, 1881.)

3. The right never to be condemned without being heard. If the individual does not appear, his absence will not impede the action of justice. But the law reserves for him a way to be heard, even when there is no excuse for his nonappearance. In misdemeanors and trespasses (*délits et contraventions*) the opposing side (apart from the right of appeal) again brings up the entire matter before the same tribunal. Liberal conditions are granted, which provide for special circumstances. The law of June 27, 1866, referring to correctional matters, decides that the right of defense is granted the prisoner by the right of opposing, in case he is ignorant of the sentence rendered against him, until the penalty is debarred. (Art. 187.) In criminal

<sup>1</sup> Art. 81 of the constitution of November 4, 1848: "Trials are public, unless publicity may be dangerous to order or morals, when the tribunal so decrees."

<sup>2</sup> Art. 29, law on legal assistance, of January 22, 1851: "The presidents of correctional tribunals will appoint counsel for prisoners who are subjected to public prosecution, or who are detained while awaiting trial, when they shall request it or when their poverty shall be proven." The advocate thus designated gives them his services gratuitously. The bar association consider it an honor to defend without remuneration those who are poor.

matters judgment by default is pronounced by the court of assizes without the assistance of the jury. The sequestration of property is ordered, as well as other severe measures against the individual "rebellious to the law;" but if the accused (*condamné*) appears, or is arrested before the punishment is debarred by limitation, the sentence is annulled and the process is begun again in the ordinary way. (Art. 476.)

Trials are oral. The tribunal does not accept the results of the preliminary examination, if one has been made, but receives new testimony from the witnesses. The principle of oral arguments involves modifications which are explained on the ground of utility or practical necessity. Thus the witnesses heard during the first trial (where their declarations are noted; arts. 155, 189, amended by the law of June 13, 1856) by the simple police judge, or by the tribunal of correctional police, are not necessarily summoned in case of appeal. But they may be, and new witnesses can even be called. (Art. 175.)

The decision as to guilt is left entirely to the judge. He estimates the evidence, the value of which is entirely moral. There are numerous provisions to set aside the old system of legal proofs, which governed and restricted judicial conviction, which necessitated or prohibited the sentence, according to certain rules fixed a priori, no matter what the actual sentiment of the magistrate may have been. "The law does not demand from the jurors an account as to the manner in which they have become convinced. The law does not say to them, "you will accept as true any fact attested by such and such a number of witnesses;" or, "you will not consider sufficiently proved evidence which did not include such and such a report or details, testified to by so many witnesses or so many indications." The law asks only this question, which comprises their entire duty: "Have you an inmost conviction?" (Instruction to juries, art. 342.) The law demands from other judges an explanation of the way in which they become convinced, since they must give the reason for their sentences or decrees. But the convincing force of the testimony, of the indications, of the papers of all sorts presented in the court, is left to their opinion, as in the case of the jurors.<sup>1</sup>

There are exceptions to this principle. In simple and correctional police matters certain reports constitute absolute proof under conditions fixed by law. Until falsehood is alleged, or until there is written or sworn evidence to the contrary, facts verified by the competent officer must be accepted (arts. 154, 189); nevertheless, the provisions are taken in a sense favorable to the prisoner.

Without now insisting on the application of these general principles to offenses of simple or correctional police, in the first trial or on appeal,<sup>2</sup> we will examine the extent of the authority and the procedure of the court of assizes.

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<sup>1</sup>A possible confusion must be provided against here. In civil matters the methods of proof are defined by the code. The witnesses can not usually prove the existence of an agreement when the value is over 150 francs (art. 1341 and following of the Civil Code). The rule applies in penal jurisdiction. In an offense of violation of deposit (art. 408, sec. 1, C. P.), if the amount deposited exceeds the value of 150 francs, written proof of the contract referred to should usually be produced before the correctional tribunal, when a demand for restitution is brought. The nature of the evidence depends on the nature of the action. The agreement is subject to the rules of the Civil Code. As for the offense itself, any means of enlightening the judge as to the guilt is admitted.

<sup>2</sup>Provisions: Tribunals of simple police, arts. 138, 141, and following, with amendments of the law of January 27, 1873; art. 172 and following. \* \* \* Tribunals of correctional police, arts. 179-216; law of May 20, 1863, on flagrant misdemeanors.

*The court of assizes and the jury.*—It was not without opposition that the institution of the jury was accepted by the code of 1808. It was also not without restrictions. Its jurisdiction was limited. The organization of the jury was in a manner subject to authority.

*Jurisdiction.*—The competence of the court of assizes was limited by the organization of special courts. (Art. 553 and following.) These courts, composed of five magistrates and of three representatives of the army having at least the rank of captain, had charge of crimes committed by vagrants or by those already condemned for criminal offenses, of crimes of armed rebellion against armed force, of armed smuggling, of counterfeiting, of assassination committed by armed mobs. On account of the fear of lack of energy a jury was not called. The special courts, like the special criminal tribunals of the law of Pluviôse, year IX, were designed for social protection. But with changed conditions they appeared to be a disquieting anomaly, not in accord with the spirit of modern law. Public opinion, when it is not dominated by the dread of imminent danger, foresees or imagines the possibility of arbitrary rulings. It was thought that the number of cases which would be under the jurisdiction of these courts would be increased, that wider authority would be claimed for them, and that it would be safer to have all cases tried by the same judicial institutions, with no special tribunals. They were suppressed by the charter of 1814 (arts. 62, 63). The provost courts, which for a short time took their place and had authority to try some political cases as well, were finally prohibited by the charter of 1830 (arts. 53, 54). “No case can be diverted from its natural judges. In consequence, there can be no commissions or extraordinary tribunals created under any title or denomination whatever.” It would be interesting to recall the historical import of these provisions, the abuses which they were designed to remedy, the weapons which they furnished in subsequent judicial and legislative discussions—especially in the one relative to the declaration of the state of siege.<sup>1</sup> We have been obliged to omit from this review all consideration of extraordinary jurisdictions. To return to the prerogatives of the court of assizes and the jury, they were at first restricted, and we have just explained their reconstruction. The court of assizes only has ordinary jurisdiction of criminal matters. But this simple statement is not sufficient.

1. The examination ended, the prisoner is sent under indictment to the court of assizes by a decree of the chamber of indictment. This decree may be opposed by a petition (*pourvoi*) to the court of cassation (especially arts. 296, 301). Suppose that the petition has not been made or that it has been rejected; the court, taking cognizance of the case in virtue of the decree of transference “will pronounce the punishment enacted by law, even when, after the arguments, the case is found to be no longer under the authority of the court of assizes.” (Art. 365.) The decree of transference thus ascribes to the court of assizes an authority which can no longer be questioned. It has full jurisdiction. It is different in other tribunals. In principle (see nevertheless art. 192) every penal judge has only a defined function, and can not take up matters which do not belong to his domain. The granting of full jurisdiction in this case is ex-

<sup>1</sup> Art. 8, law of August 9, 1849, on the state of siege: “Military tribunals can take cognizance of crimes and offenses against the safety of the Republic, against the constitution, against public peace and order, no matter who the principal author or the accomplices may be.” In principle, “a state of siege can be declared only by law.” (First article, law relative to the state of siege, April 3, 1878.)

plained by the inconvenience of a second procedure, which it would be necessary to begin in another tribunal, while the court and jury are entirely enlightened as to the nature and the importance of the fact. It implies, however, that the jury (although only summoned to judge crimes) has nevertheless a general authority which it may accidentally be called upon to exercise in regular cases. The establishment of the jury system in correctional matters has often been demanded, but never with success, because of the trouble it would impose upon citizens, besides the danger of carelessness in the punishment of offenses which may be serious but are trifling in appearance.

But the law requires a jury in criminal processes, because of their gravity. Should it not also be required for certain misdemeanors on account of their nature?

2. The response to this question has been subjected to numerous vicissitudes. It may be seen that political offenses and offenses of the press or of speech are principally meant. The changes in constitution and in authorities, the influence of time or parties, have all affected this branch of our legislation. The excitement of the contest has at times obscured the real issue. The liberties and the guarantees of the press, viewed as an organ independent of political controversy, have been confused with erroneous ideas. The law of July 29, 1881, which now governs us, has often been altered. Parliament has successively taken away from the jury many classes of offenses and placed them under tribunals of correctional police.<sup>1</sup> Among those yet assigned to the jury—it would be a mistake to suppose that this is the case with all political misdemeanors—the defamation of public officials in the performance of their functions should be mentioned. (Art. 31, law of July 29, 1881.) The detractor arraigned before the court of assizes may then prove the truth of the fact that he has imputed to the official. The process may begin by a direct summons. The procedure resembles in many ways that of correctional tribunals, except that it is the duty of the jury to condemn or acquit attacks on the administration.<sup>2</sup>

*Composition of the court of assizes.*—The court of assizes is not permanent. Every three months sessions are held in each department. In practice, they should not last over fifteen days. Extraordinary sessions can be held either because the ordinary session is not long enough, or when a case is urgent. (Compare art. 59, law on the freedom of the press, July 29, 1881.) In Paris, by means of an organization which we have not time to analyze, the sessions open regularly twice a month.

There are three magistrates in the court of assizes, one president and two assessors. The president is always a counselor of the court of appeal; the two assessors are chosen from the counselors when the court of assizes is sitting in the department where the court of appeal resides, and in other departments from the members of the first tribunal. This is the usual rule.<sup>3</sup>

<sup>1</sup>Laws transferring jurisdiction: Law of August 2, 1882; March 6, 1893, and July 28, 1894.

<sup>2</sup>See especially articles 45 and following, law of July 29, 1881, with amendments made by the laws indicated in the preceding note, and the law of December 12, 1893.

<sup>3</sup>Principal texts to be consulted: Law of April 20, 1810, articles 5, 16, and 22; decree of July 6, 1810, articles 79 and following; articles 281-290, Code of Criminal Instruction, amended by different laws, especially those of December 25, 1815, of March 4, 1831, and of March 21, 1855.

The public prosecution is represented in the departments where the court is situated by the attorney-general (*procureur général*) and the general barristers (*avocats*)

Nothing has been changed more than the method of forming the jury. The code enumerated the various classes of persons from which it should be chosen. Other names might also be admitted, with the permission of the minister of the interior, at the request of anyone who aspired "to the honor of performing the functions of juror," or on the proposition of the prefect. (Original arts. 381-386.) The prefect prepared a list of sixty citizens, on the requisition of the president of the assizes, at least fifteen days before the session opened. This number was at once reduced by the president to thirty-six. The list was thus prepared by the prefect, the direct representative of the Government, almost on the eve of the session, when the cases to be tried were already known. In each case a selection of twelve jurors out of the thirty-six was made, with the right of challenge by the defense and the prosecution. This is the only principle that survives. All the rest have been modified.

First, jury service was conditioned upon the right to vote. In 1848, when universal suffrage replaced freehold (*censitaire*) suffrage, it was decreed that all French citizens of 30 years of age having civil and political rights should be placed upon the general list of the jury, except in case of incapacity or of exemption. (Decree of August 7, 1848.) Nevertheless this list was never identical with the electorate. It is no longer considered such a civic honor to serve on the jury, or at least to have the name inscribed on the list at intervals. It must not be forgotten that this is a duty, and there can not be too many guarantees of maturity, honor, and independence. The present law of November 21, 1872, no longer recognizes this general list of the jury analogous to the list of electors. It only defines the conditions necessary to be a juror: "No one can perform the functions of a juror without nullifying the declaration of guilt in which he may have agreed if he has not reached the age of 30 years, if he does not have political, civil, and family rights, or if he is subject to the conditions of incapacity or incompatibility established by the two following articles."

In the second place, it is not enough to know who may be on the jury. It must also be known who really will be the jurors, by what process they will be selected among all the citizens who fulfill the legal conditions. The system of the code of 1808 is obviously defective. Without following all the stages of its slow and laborious evolution,<sup>1</sup> what is the system now in use (law of November 21, 1872)?

1. The list is no longer made for each session, but for the following year, long enough in advance and comprehensive enough to obviate the danger of its having been selected in view of an important case, especially a political case. This is the annual list. The choice is made by commissions which were differently composed by laws of 1848, 1853, and 1872, and the chief elements of which were successively taken from the elective bodies, from the administration, and from the judiciary.

On the annual list there is one juror to 500 inhabitants in each department (400 is the minimum, 600 the maximum).<sup>2</sup> This number is

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*généraux*), substitutes for the attorney-general (art. 252); in the other departments by the Government attorney of the first tribunal or his substitutes (art. 253), formerly by a substitute of the attorney-general or an imperial criminal prosecutor, which functions were suppressed by the law of December 25, 1815. The attorney-general has always the right to appear in the case (art. 284).

<sup>1</sup> Law of May 2, 1827; decree of August 7, 1848; law of June 4, 1853; decree of October 14, 1870; law of November 21, 1872.

<sup>2</sup> The criticism has been made that this number is too limited, or that the names are not entirely renewed every year.

divided according to districts and townships in proportion to the population. In each township a commission composed of a justice of the peace, his substitutes, and the mayors prepares a preliminary list. In each district another commission composed of the president of the tribunal, the justices of the peace of the townships, and the general counselors of the district prepares the final list. The lists of the different districts are collected at the registry of the court of assizes. In the city where the assizes are held an additional list of substitute jurors is made.<sup>1</sup>

2. At least ten days before the opening of the assizes the names of thirty-six jurors are publicly drawn from the annual list and the names of four substitute jurors from the special list. (Law of July 31, 1875.) Thus the list of the session is formed. Provision is made therein, after the court of assizes has convened, for excusable hindrances and even for illegal absences, as well as for evidence of unfitness for service which had not been previously procured, but it is necessary to have always at least thirty jurors. This is sometimes called the revision of the list of the session. (Art. 19, law of November 21, 1872.)

3. Finally, in each case, these names are placed in a ballot box. As they are drawn out, the prisoner or his attorney and the public prosecution can object to such names as they desire. This challenge is peremptory; no reason is given. When twelve names to which there is no objection have been secured, the panel is formed, and we have the jury of trial (*jury de jugement*). (Art. 399 and following of the Code of Criminal Instruction.)

*The trial.*—The text of articles 310 and following gives the best summary of the procedure in the court of assizes. Every detail is regulated in conformity with the general principles which we have already stated. The hearing of witnesses is accompanied by the most minute guaranties, both as to the truth of the testimony and the candor of the defense. The witnesses testify separately. Before testifying they must always take an oath to speak without hate and without fear, to tell the whole truth and nothing but the truth. False testimony for or against the prisoner is severely punished. (Art. 361 of the Penal Code.) The witness can not be interrupted. After his deposition the accused or his counsel can question him through the medium of the president, and can say both against him and against his testimony all that may be useful in defending the accused. The accused can demand, after the testimony has been taken, that those whom he may designate shall retire from the audience, and that one or more of them may be brought in and heard again, either separately or in the presence of the others.

The president has control of the hearings. He directs the trial, and also has a discretionary power which does not exist in simple or correctional police matters,<sup>2</sup> "in virtue of which he can do all that he may think useful in the discovery of the truth, and the law charges his honor and conscience to employ all efforts to facilitate its mani-

<sup>1</sup> For exact details, and for the special organization of the department of the Seine, read Title II of the law of November 21, 1872.

<sup>2</sup> This difference is sometimes explained by saying that the correctional tribunal and the simple police tribunal, permanent jurisdictions, could always without impropriety remit the judgment of the case to a further hearing, by ordering a complementary set of proofs in legal form.

In the interval between the sentence of reference to the court of assizes and the appearance of the accused before the jury the president of the court of assizes has a power of complementary examination. He can especially summon and hear witnesses not previously examined. (Arts. 303-304).

festation." He can especially hear all persons, but not on oath, even those not registered on the list of witnesses (notice of which list should be sent to the accused by the attorney-general or the civil party, or to the attorney-general by the accused, twenty-four hours before the examination); he can have brought all written evidence that may throw any light on the case. This discretionary authority, which can not be exactly defined except by article 268, just cited, is not, however, in the least arbitrary. If it is difficult to give a satisfactory rule for all possible cases, it is at least incontestable that the essential principles of the procedure, the right of contradiction, the oral or chiefly oral character of the testimony and trial, should not be altered; and, as the court of cassation has decided, the president who requires the testimony of a witness who is present to be read before the witness has been heard orally in the official notes of the examination, nullifies the trial; since he thus gives written procedure the principal rôle, instead of making it accessory, as it should be. (Compare art. 318.)

After the requisitions, the pleading, and the replies, if it is deemed best—the accused or his counsel has always the right to make the last reply—the president declares the trial closed.

*The verdict and the sentence.*—1. The jury is judge of the guilt. The court, which decrees elsewhere on the disputed claim, is judge of the application of the law. These prerogatives, though divided, are yet, in a way, blended. The court, when guilt is recognized in the verdict of the jury, makes the penalty indulgent or severe, within the limits of the minimum and maximum; it decreases it more or less when extenuating circumstances are admitted. (Art. 463, Penal Code.) It is the court which grants or refuses the reprieve to the execution of the penalty of imprisonment when the law Bérenger of March 26, 1891, is applicable. It has even a certain control over the declaration of guilt "in those cases when the prisoner is known to be guilty, and when the court is convinced that the jurors have erred, although they may have acted in accordance with the rules, it grants a delay to the sentence and refers the case to the following session." (Art. 352, modified by the law of June 9, 1853.) On the other hand, the jurors "fail in their duty when, reflecting upon the provisions of penal law, they consider the penalty that may result for the prisoner from the verdict which they have to render." This passage is in the instruction to juries (art. 342), but it is now a dead letter. When, in 1832, the jury was allowed to consider extenuating circumstances, it was several times repeated in the preparatory works that such action was necessary in order to modify the penalty when it appeared too harsh, as if the legislator wished to confer on this temporary magistracy the right to regulate the law, and to apply it not only in view of the facts in the case, but often in accordance with the times and with popular ideas. After all, the jury, when it could not alter a provision which it considered, wrongly or rightly, unreasonable, has sometimes resolutely transgressed it by acquitting, contrary to all evidence, the acknowledged author of the infraction. Its verdict is without appeal, and no reason need be given therefor. The extenuating circumstances, which the jury is also not required to explain, should at least lessen this abuse. Jurors are influenced by some excuse which they think applies to the prisoner—a thoughtless impulse, the sentiment of repentance—or they simply do not approve the legal provision. Often extenuating circumstances are declared for no other reason when the penalty of death is involved.

2. The jury should reply to the questions presented to it in writing

concerning the facts contained in the accusation and concerning the circumstances which, according to the arguments, appear of an aggravating or an extenuating character. (Arts. 271, 336 and following.) While intermediate law minutely analyzed, in their various forms, the many elements of the incrimination, considered successively in regard to the material effect and the morality of the acts (arts. 374-375, code of Brumaire, year IV), while the code of 1808, by an inverse method, included them all in one question relating both to the crime and the circumstances (art. 337 and original art. 345), the law of May 13, 1836, without renewing the many interrogations of the code of the year IV, asks one question in respect to each principal fact, each aggravating circumstance, each legal excuse. It is expressed in such a manner that the jury can respond without evasion or reservation, by a simple yes or no. Otherwise the demand appears complicated and difficult of response—this is at least the general idea. There are no questions in regard to extenuating circumstances, but these are made the object of a warning to the jury, under penalty of its decision being rendered void. (Art. 341, amended by law of June 9, 1853.)

The juries hold sessions in their chamber of deliberations and vote by ballot. At the present time, after different legislative modifications, the law of June 9, 1853, prescribes that a majority is sufficient; an equal division of votes results in favor of the accused; 7 votes are then necessary to declare him guilty. But it requires a majority to admit extenuating circumstances, and an equal number of votes, 6 against 6, instead of being in favor of the accused, is equivalent to a denial of their admission. The verdict of the jury does not indicate the number of votes which constituted the majority, nor does it disclose that the verdict is unanimous, if that happens to be the case. (Art. 347.)

When the verdict is negative—"Is the prisoner guilty? No"—the president acquits him and orders that he be given his liberty, unless he is held on other charges. When the verdict is affirmative—"Is the prisoner guilty? Yes, with a majority"—the court pronounces the penalty according to the delinquency and the circumstances declared by the jury; or pronounces absolution in case it is found that the act for which he is incriminated is not prohibited by penal law (art. 364). In all cases the court decides the damages claimed by the civil party against the prisoner, or by the prisoner against the civil party.

3. The declaration of the jury is final. It can not in itself be appealed on the ground of wrong judgment to a superior jurisdiction. But if the procedure is irregular, if the court of cassation recognizes a flaw in the trial, or in any of the preceding or accompanying formalities, the verdict falls with the case, and the trial will be recommenced before another jury (art. 408-434, sec. 2).

Even this does not take place in case of acquittal; the annulment of a decree of acquittal can be obtained and pronounced only in the "interest of the law," and without prejudice to the individual (art. 409—compare, for the exact interpretation of the rule, court of cassation, July 27, 1888).

The acquittal is final from another point of view; it can not be revoked on the ground of new charges; unlike the decree of lack of cause (*non-lieu*), which is of a provisional character only, it is irrevocable. The person acquitted can not be "rearrested for or accused of the same crime" (art. 360). Jurisprudence has, however, restricted this privilege of the negative verdict, although according to this

article it appears absolute. The same punishable act can sometimes be qualified in several ways. Voluntary homicide is qualified murder (manslaughter); the homicide may result from an imprudence, provided for by article 319 of the Penal Code. If the president of the court of assizes presents only the question of voluntary homicide in conformity with the decree which has brought the matter before the court, the acquittal does not go beyond this; and the question of accidental homicide, which has not yet been considered, can be taken to the tribunal of correctional police. It is the same act in reality, but differently qualified, and the individual is never rearrested for an act judicially the same.

If the president, on the contrary (as he has the right), presents the subsidiary question resulting from the trial of accidental homicide, following the principal question of a voluntary homicide, and the jurors have rendered a negative verdict on each question, they have settled the two cases.

Appeal for annulment may be taken from the sentences of the court—either the sentence of condemnation, for decreeing a punishment other than that indicated by law—or the sentence of absolution, for having released the prisoner on the supposed nonexistence of a penal law which, however, existed (art. 410 and following).

When the sentence is reversed on account of incorrect application of penalties, the new court of assizes to which the case is sent renders its sentence on the verdict of the jury, which is not vitiated, although the magistrates may have erred in the decision which they based thereon.

#### THE COURT OF CASSATION.

The organization of the court of cassation, the supreme court in civil and penal matters, dates from the law of November 27, 1790.

This court decides (except in case of certain distinctions, arts. 526–527) on the rulings of judges—that is to say, in conflicts of authority; it orders transference from one tribunal to another, in consideration of public security or on account of legitimate suspicion (art. 542); it is able to arraign officials for forfeiture and crimes committed in the administration of justice (art. 485 and following); it is the superior council of the magistracy, for disciplinary errors (arts. 13 and 14, law of Aug. 30, 1883), and it is especially the judge of appeals for annulment and demands for revision, two very important and wholly dissimilar forms of recourse. The application for annulment is to correct a violation of the law, and the demand for revision is granted only in cases of certain errors “*de facto*,” commonly called judicial errors.

*The appeal for annulment.*—The principal mission of the court of cassation is to insure the consistency of jurisprudence by the exact interpretation of the laws. The lower courts have authority to estimate the facts in the case, each in its own sphere. This court regulates the application of the law. To thoroughly understand all the provisions of the appeals for annulment it is necessary to carefully examine in regard to those persons who can bring them, the conditions when they are admissible, and their effect. But we must overlook these fine distinctions and difficulties, which may be said to be incidental, and summarize as follows: Appeals for annulment can be brought on the ground of incompetency, excess of authority—omission or violation of important forms, or those prescribed under penalty of nullifying the action—violation, false application or false interpre-

tation of the law. The court of cassation (the criminal chamber in penal matters) does not judge either the offense or its cause; it controls and judges the procedure and the sentence. If these have been in conformity with the law, the appeal is rejected; in the contrary case the sentence is reversed, and the case is usually sent to a jurisdiction of the same order as that which rendered the decision now annulled. (Compare arts. 427-429.)

It sometimes happens that the tribunal to which the case is referred confirms the first decision, contrary to the judgment of the court of cassation, and that an appeal is again made on the same ground. The court of cassation holds a session with all the chambers assembled; if the second sentence or judgment is set aside for the same reasons, the court or tribunal to which the affair is again returned must comply with the decision of the court of cassation on the point of law which it has settled (law of April 1, 1837).

The individual interest of the condemned person, the general interest confided to the public prosecution, which acts before penal judges, suffice ordinarily to refer all irregular decisions to the court of cassation. But it is possible, by the negligence or indifference of the parties in the case, that it may happen otherwise. The questionable decision, which has not been annulled, rests as an unfortunate precedent, and the institution fails in its most important object. Thus, when no demand has been made within the legal limit of time, the attorney-general before the court of cassation can bring up the case and obtain the annulment, but in the interest of the law, without the parties being able to take advantage of it, and solely for maintaining or reinstating jurisprudence in the right path (art. 442).

The minister of justice can also give the attorney-general before the court of cassation directions to appeal against decisions, judgments, and "judicial acts." The text (art. 441) no longer says that the appeal by order of the minister exists only as a matter of honor or as a safeguard of the principles. The effect of the provision has been discussed, and the doctrine maintains, with the appearance of probability, that it might profit and would never injure the defendant.

*The appeals for revision.*—The appeals for revision have as their object the annulment of a sentence which otherwise is definite and irrevocable,<sup>1</sup> when the person condemned is not the author of the crime. French legislation never admits the revision or the renewal of the process against an individual if proof of guilt is brought after the prosecution is closed.

It was believed that intermediate law, after having established penal procedure on new principles, had so far eliminated the chances of judicial error that appeal for revision might be suppressed; but it was not long before it was again admitted, though with restrictions. In the course of the nineteenth century, legislation more and more

<sup>1</sup>The methods of ordinary recourse—that is to say, the opposition and the simple appeal—so long as the time of delay has not expired, are sufficient to thwart an erroneous sentence concerning misdemeanors (*délits*). It has happened that an individual wrongly condemned by correctional police has no longer time to take appeal when irrefragable proof of his innocence was established. But the attorney-general before the court of appeal is entitled to a longer delay (two months—art. 205) than the prisoner or the Government attorney (*procureur de la République*) who has ten days (art. 203). It is his duty to employ it in obtaining by appeal correction of the error which has been committed. The public prosecution essentially represents the social action, which demands a just punishment but which repudiates unjust penalties. It is for this reason that the appeal of the public prosecution can, according to the case, injure or protect a prisoner.

extended the domain of revision. Neither law nor human justice, in its mission of social protection, is infallible. They command respect in their effort to prevent errors and to repair those which are inevitable.

The code of 1808 accorded revision in three cases only of criminal matters. It was modified by the law of June 20, 1867. Revision was extended to the more important correctional matters. It was admitted in case of a condemned person deceased. Legislative reform was effected on this last point on account of a celebrated case which dated from two sentences in the years IV and IX; but it is known that revision, or rehabilitation,<sup>1</sup> could not be legally accorded, although it was commonly considered self-evident, because the two sentences were not at all irreconcilable, as exacted by article 443.<sup>2</sup>

The only cases in which revisions were admissible were drawn up in restricted terms: 1. When, after a sentence for homicide, further evidence is brought to show that the alleged victim of the murder is actually alive. 2. When, after a sentence for crime or misdemeanor (*délit*), another person shall have been condemned for the same delinquency by another decree or sentence; and when the two sentences can not be reconciled, their contradiction will be the proof of the innocence of the one or the other of the prisoners. 3. When one of the witnesses shall have been, subsequent to the sentence, prosecuted and condemned for false testimony against the accused or the prisoner. Revision was not possible if death or prescription had prevented the condemnation; in the second case, of another individual for the same crime; in the third case, of the false witness. Pardon can alone modify the rigor of the law; but if it remits the penalty, it does not efface the sentence.

Some instances have seemed to prove that the system of the code amended by the law of 1867 was still certainly too restricted. (See the law of June 8, 1895.)<sup>3</sup>

In virtue of that law, article 443 of the code is now worded as follows:

Revision may be demanded in a criminal or correctional matter whatever may have been the jurisdiction which has been exercised or the penalty which has been pronounced: 1, \* \* \* ; 2, \* \* \* ; 3, \* \* \* (these are the three cases admitted before); 4, when, after a condemnation, a fact has been produced or brought to light or when documents unknown during the trial are presented of a nature to establish the innocence of the condemned.

This general formula was made to avoid the insufficiency of the old enumeration. But there exists an important difference between the fourth case and the others. In the first three cases the right to ask revision belongs to the minister of justice, to the condemned, or, in case of incapacity, to his legal representative; after the death of the condemned, to his partner, to his children, his parents, to his residuary legatee, or to those who have received from him the express authority. But in the fourth case the right to ask for revision belongs to the minister of justice alone, who will decide after having taken the advice of a commission composed of directors of departments of

<sup>1</sup>This expression, though often employed, is inexact. Rehabilitation, in a legal sense, is another institution; it refers to a condemned person, who by his conduct merits relief from his sentence and the disqualifications which it involves.

<sup>2</sup>Affaire Lesurques, court of cassation, December 17, 1868; Recueil Sirey, 1868, I, 457.

<sup>3</sup>That law was discussed, based upon my report, by la Société Générale des Prisons (Revue Pénitentiare, 1895, p. 940).

his ministry and of three magistrates of the court of cassation annually designated by it and taken outside of the criminal chamber. It has been hoped by this means to avert rash demands which might arise from an abuse of the general formula adopted by the law of 1895. But, in my opinion, it is not logical that the minister should judge beforehand of the value of a demand for revision when some one pretends to have been the victim of an error.

Petitions for revision are carried before the court of cassation. If a petition is admitted,<sup>1</sup> the court annuls the judgments or decrees and commits the case to a court of assize or to some other tribunal than that which judged it first; but when there can not be a new trial with both sides represented, especially in case of death or contumacy, the court of cassation decides the whole case, and when nothing exists which can be designated as a crime or misdemeanor the condemnation is annulled without further reference.

Finally, when a judicial error has been recognized, the law of June, 8, 1895, provides a double reparation, moral and pecuniary. The moral reparation consists in the publicity given to the judgment establishing the innocence of the condemned person. The pecuniary reparation is accorded by reason of the prejudice caused by the unmerited condemnation.<sup>2</sup>

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<sup>1</sup> The law of March 1, 1899, has established a distinction, which may thus be summarized: The criminal chamber itself judges the petition for revision when it is able to do this without the necessity for an inquisition. If, however, an inquisition is made, the three chambers of the court in general session admit or reject the petition.

<sup>2</sup> Art. 446, law of June 8, 1895. The decree or judgment of revision establishing the innocence of a condemned person, shall, upon his demand, award to him damages, on account of the prejudice which the condemnation has caused him. If the victim of the judicial error is deceased, the right to demand damages shall belong, under the same conditions, to his partner, to his children, and to his descendants. It shall not belong to relatives of a more distant degree, only as they establish the fact that they have suffered from a prejudice resulting from the error of the condemnation. The damages awarded shall be at the expense of the State, except as the State may recover from the party civil, the informer, or the false witness through whose fault the condemnation may have been pronounced. The decree or judgment of revision establishing the innocence of a condemned person shall be posted in the city where the condemnation was pronounced, in that which is the seat of the jurisdiction effecting the revision, in the commune of the place where the crime or the offense shall have been committed, in the domicile of him who has demanded the revision, and of the last domicile of the victim of the judicial error, if he is deceased. It shall be inserted in the Official Journal, and its publication shall be ordered in five other journals, chosen by the petitioner for revision, if he shall require it.

## THE CRIMINAL LAW OF THE GERMAN EMPIRE.

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### THE CRIMINAL CODE.

No law system can be understood without a knowledge of its history. To transfer it from one country to another would be possible only in case of similar historical and social conditions, or serious damages might result for the nation adopting a foreign code. Nevertheless, the knowledge and comparison of different laws is of the highest value, as so many single points of our systems are alike that a better idea of their differences helps us to a better understanding of our own law.

The Criminal Code of the German Empire bears date May 15, 1871. Its constitutional basis is found in the constitutions of the North German Union and of the German Empire, article 4, No. 13. The first draft was published in 1869, and the code itself was finished in 1870, before the Empire was founded. It was adopted in its completeness by the Empire and got its new title through the law of May 15, 1871, according to which the code came into force on January 1, 1872. Some necessary alterations were made through the law of February 26, 1876. Since that time the code has been altered in only very few points.

Our code is the direct descendant of the Prussian Criminal Code of April 14, 1851, which introduced the maxims of the old Napoléonic Code Pénal of 1810. This code in its course of victory had already affected some German codifications, but none followed its system so closely as the Prussian code. So our new law has many of the evils of the French code—i. e., the “tripartition”—but many points are altered and really amended. This adoption of a foreign system was possible only on account of the relationship of the two nations and the history of their legal institutions and because of the clear and modern conception of the French code, but doubtless in our criminal law many old German ideas are seriously damaged.

The Criminal Code is not the only common criminal law we have. There are besides some dozens of “extravagantia” laws of minor or greater importance, dealing with penal questions, as, for example, the health laws, copyright, and patent laws, the law of the press, against slave trade, and others, and so there arises the difficulty of bringing all the different laws into one system.

The old Germans, like all primitive peoples, did not distinguish clearly between criminal and civil law. They had not yet come to the point of understanding that the imposition of punishment belongs to the community. Any damage was prosecuted by the individual, and no difference is to be found between civil and criminal law. In very few cases the community itself was hurt, and demanded a revenge. So we find two special features in the old German law: That no real difference was made whether a damage was founded in an evil intent or not—even when a cow caused the death of a man there followed a

punishment; and, secondly, that the punishments were only fines, taxes, just as for a civil damage. No question but these or similar ideas are still at the bottom of our criminal law.

A higher developed state could not longer be satisfied by these institutions, and ideas better suited to the times were laid down in the Roman law.

Though the Romans, too, did not quite come to a clear distinction of civil and criminal law, and though they did not develop quite as high a system of criminal law as of civil law, yet they were far advanced in the notion of public prosecution and public punishment of crimes. Their ideas penetrated the ecclesiastical law, where the new thought was developed that crime is a sin against God. Italian doctors deepened the system, and with the flood of Roman law at the end of the Middle Ages a new Roman-Italian criminal law, more suitable to the needs of modern times, entered the German lands and was soon popularized. The movement was finished by that excellent work of the Baron of Schwarzenberg, the *Constitutio Criminalis Bambergensis* of 1507, which is again the mother of the *Constitutio Criminalis Carolina*, the Criminal Code of the Emperor Charles V of 1532. This book was the fundamental of the common criminal law of Germany up to our century.

During the eighteenth century there awoke newer, higher ideas of human rights and the State, and they bore newer and better criminal codes, the best and highest of which is the French code of 1810. This one, because it was the clearest expression of modern ideas, soon replaced the newer German codes in the different States.

At the end of the nineteenth century there began a new movement in all sociological departments. As soon as this reaches a certain stage, and when the new German civil-law system is realized, the twentieth century will give us a more modern criminal law.

German literature of criminal law is very voluminous. I only mention a few prominent newer works.

The criminal code is ably interpreted through Oppenhoff (13th edition, Berlin, 1896), Olshausen (5th edition, Berlin, 1898), Frank (Leipzig, 1897).

The other criminal laws are to be found in the book of Stenglein, Appelius, and Kleinfeller, 2d edition, Berlin, 1895, and supplement, 1898. The jurisprudence of the Reichsgericht is laid down in a very valuable collection (*Decisions of the High Court of the Empire in Criminal Law*, Leipzig, 30 volumes). A first volume of a Handbook is written by Professor Binding, whose *Principles and Normen* (two volumes, Leipzig) are very well known. The Lehrbuch course, now most used and certainly up to date, is that of Professor Liszt (8th edition, Berlin, 1897), besides which the course of Prof. H. Meyer may be mentioned (5th edition, Leipzig, 1895). Four reviews and magazines for criminal law are published in Germany: The *Zeitschrift für die gesamte Strafrechtswissenschaft*, Berlin, the *Gerichtssaal*, the *Archiv für Strafrecht*, and the *Blätter für Gefängnisskunde*. The Criminal Code is ably translated by Geoffrey Drage, London, Chapman and Hall, 1885, though this book shows some grave misunderstandings.

A criminal code has at first to deal with some preliminary questions, viz: For what sort of cases its rules are given; the local limits of the law; its application with respect to time; what persons are subjected to its rules.

(a) The first of these questions is a complicated one in Germany, where legislation, as in the United States, is divided between the Imperial Federation and the different States composing the Empire.

According to the rule that imperial law is higher than State law, any State law dealing with matters settled by a formally valid imperial criminal law is invalid. This rule is laid down in the introductory law for the Criminal Code, section 2, and is likewise applicable for any other criminal law. There is only one difficulty arising in single cases—whether a question is really fully treated by the imperial law, so that no State law touching the subject can consist together with it. Some subjects of minor or a mere local interest are expressly left to State legislation; and quite naturally the most police contraventions are on account of their more local importance not regulated by the common law. Only some of them are treated in the Imperial Code, where a special chapter is devoted to "Uebertretungen," contraventions. These are not all police offenses, though the most of them are. Some of these rules provide a fine only "in blanco" in case that the State or another imperial law might give certain police regulations.

So we find in all States a rich legislation on minor offenses. Here the rule of the Criminal Code is that the States can not provide for other punishments than those of the common law, and that the limits for the State legislation is fixed to two years' imprisonment, arrest up to six weeks, fines, confiscations, and deprivation of public offices. (Introduct. law, sec. 5.)

The question whether the general regulations of the Criminal Code, which certainly are the same for any other imperial criminal law not specially exempt, now govern the State law too is much discussed. The right answer may be that only those general regulations are obligatory for the State law which are fundamental ones—i. e., that of responsibility.

(b) The German code is applicable only in German courts, but is it only applicable in cases when crime is committed in a German territory? This long-discussed question is by the German code answered as follows:

SEC. 3. The criminal laws of the German Empire are applicable to all criminal acts committed in German territory, even if the author is a foreigner. Extension is made by special laws to persons subject to consular courts, and vice versa. As a rule, no act is prosecuted if committed in a foreign country (sec. 4), but in some cases an exception is made: (a) For Germans committing special felonies or misdemeanors in a foreign country (that is, one that does not belong to the German Empire, section 8) when they affect the German Empire or are of such a nature as to demand prosecution everywhere, this because Germans never are delivered to a foreign government (sec. 9); (b) for Germans and foreigners committing acts seriously affecting the German Empire, as high treason, making or issuing counterfeit money, engaging in the slave trade. These exceptions are much wider than those of the Anglo-American law. Here the foreign law and the foreign judgment are respected to a certain extent. (Secs. 4, 5, and 7.)

In order to secure punishment in as many cases as possible the German Empire and the single States made extradition treaties with foreign governments engaging themselves to deliver any foreigner for certain crimes and misdemeanors committed not in German territory to any government which might prove a right of prosecuting this act and person. The law relating to this question is not yet uniform, and there does not yet exist an "extradition act," oftentimes demanded by the doctrine.

(c) According to the time when the law is applicable, the code says—following the old rule, *nulla poena sine lege criminali*—that the criminal law must exist before an act is committed which shall be punished according to that law (sec. 2); but if the law changes between the time the act is committed and the sentence, the mildest law is to be applied.

Our code does not tell when or where it thinks an unlawful act is committed, and leaves this vexed question to theoretical research. Doctrine and jurisprudence on this point say: An act is committed in any place where a part of it is realized, i. e., murdering through shooting, where the murderer stands, where the murdered person is hit, and where he died; and the commitment of an act begins when the realization of one of its elements as named in the code begins, and it ends when the criminal object is realized—the book is stolen, the fraud is done; its results may last for a long time. Only when the result has to be kept by a constant renewal of the act, as, for instance, in withdrawing the liberty of a person, the act lasts as long as the result lasts.

(d) The common law is applicable to any individual person committing an act. Neither communities nor companies can be punished. But there are exempt:

All German military persons, for whom special laws are given. (Sec. 10.)

The members of the German diet or of the diet of a German State for any vote or for any declaration given in consequence of their position, and, furthermore, even reports on the proceedings of the German diet or of a diet of a German State are not punished if they are truthful. (Sects. 11 and 12 and constitution, arts. 30, 32.)

Some German princes, for whom special laws are enacted.

The so-called extraterritorial persons; but the two last classes are exempt only from common jurisdiction. (Law for the constitution of the law courts; introductory law, secs. 5, 18–21; Code of Criminal Procedure, introductory, sec. 4.)

The Criminal Code speaks in a first part of the punishment of all unlawful acts in general, and these general provisions are much more worked out than in American codes. It begins with an explanation of the system of punishments. (Sects. 13–42.) The first rule of great importance for all other regulations is the so-called tripartition. Every act for which the code prescribes the death penalty, penal servitude (*Zuchthaus*) or confinement in a fortress over five years, is deemed a felony (*Verbrechen*). Any act punishable by confinement in a fortress is provided up to five years, or in a prison (*Gefängniss*), or by a fine over 150 marks, is called a misdemeanor (*Vergehen*). Any act punishable with arrest (*Haft*) or a fine up to 150 marks is a contravention (*Uebertretung*). (See. 1.) This is a very unhappy regulation, founded only on external reasons, not considering the inner differences of the acts. In France, where it took its origin, it is of some value, as it is the fundamental division of the courts, a system not adopted in Germany.

It has to be noted that every punishment for any offense is fixed by the law, and that there exists no offense for which punishment is not specially prescribed by the code.

(a) The death penalty is provided in our laws only for: Murder of the Emperor or of the governing prince of the offender's State or the attempt of the offense (sec. 80); murder (sec. 211); slave robbing, if the act caused the death of one of the slaves; and deliberately causing

the death of another by explosive matter. In all these cases capital punishment is the only penalty provided by the law. The execution is by decapitation (sec. 13) and is not public (Code of Criminal Procedure, sec. 486). The question whether we could do without capital punishment was much discussed at the time of the adoption of our code, when the Government insisted on retaining this penalty. Many jurists are of opinion that in our civilization we might abolish it and that in time we shall be without it.

(b) Penal servitude for lifetime or from one to fifteen years (never below one year) is the secondary punishment, the highest in the scale of those affecting liberty. Its necessary consequence is incapability for some public duties and for holding public offices. This shows that a man punished in this way is unworthy of public esteem. Therefore he is treated worse in the prison. (Secs. 14, 15.)

(c) Imprisonment lasts from one day up to five years. The condemned person is obliged to do the labor assigned to him in the penitentiary. (Sec. 16.)

(d) Confinement in a fortress is the old "custodia honesta." It lasts from one day to fifteen years or it is for lifetime. It does not carry with it hard labor, and is threatened only in cases of a more political character<sup>1</sup> and for dueling. (Sec. 17.)

(e) Arrest lasts from one day to six weeks and does not carry with it hard labor, except in some cases of vagrancy, prostitution, and the like. (Secs. 18, 362.)

As the rules for carrying out these punishments are very few, the German prison system is by no means a uniform one. This is a great fault in our system, and pressingly needs a reform, which will come with a new criminal code. The only rules of the code are that separate confinement, which is not obligatory, though it is the basis of our prison system, can not last longer than three years without consent of the prisoner. (Separate confinement is not a special punishment, but only a mode of carrying out any imprisonment. It does not affect the term of the penalty.)

Release on parole may be granted after a certain period of the sentence has been served. (Secs. 24, 26.) This excellent system is not favored by all prison directors in the form given to it by our code.

Conditional condemnation is still unknown to our law system, but for juveniles we have introduced it as an act of the pardoning power of the princes.

(f) Besides these punishments the code provides the police workhouse for tramps, beggars, prostitutes, and persons averse to labor up to two years after the regular arrest. This idea is a healthy one, but the system of dealing with these persons ought to be altered so as to secure a greater discrimination between the different classes. And there is no reason why the penalty of the workhouse should be only an annex to the unnecessary short arrest; it ought to be the principal punishment for the above-mentioned classes. (Sec. 362.)

(g) Fines are limited for contraventions to between 1 and 150 marks (\$0.25 to \$37.50). For other acts they begin with 3 marks (75 cents). The highest fine we know now is that of the law against slave trade, 100,000 marks (\$25,000). Fines may go alone or be connected with imprisonment. In case of their nonpayment they have to be changed

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<sup>1</sup>Special arrangements for "political crimes" are unknown to our code. The expression as used in the extradition treaties seems, to our modern theory at least, very doubtful.

into arrest or imprisonment. For contraventions one day is equivalent to an amount of from 1 to 15 marks; for other acts one day is substituted for from 3 to 15 marks; the longest term substituted for a fine is, in case of contraventions, six weeks; in other cases, one year.

Our code allows the execution of fines against the inheritance when the judgment became valid during the lifetime of the person condemned; which rule is to be highly regretted. (Secs. 27-30.)

Certainly this system of fines does not correspond to our ideas of effectual punishment.

(h) The last and smallest penalty is a reprimand against juveniles. (Secs. 57, 4.)

Whipping is fortunately unknown to our code, though it now is sometimes called a very effectual punishment.

Besides these "principal penalties" we have a system of additional punishments, which are applied only in addition to those first ones. They are chiefly so-called "punishments affecting civil privileges," and are found in our laws in a great variety. Sometimes they are obligatory, but are mostly left to the discretion of the court. They are of no great importance. But one should be specially mentioned—the police supervision, added to penal servitude or imprisonment, up to five years after the end of the main punishment. This institution, certainly of the highest importance if well administered, gives some rights to the police of restricting the liberty of the person condemned, and these rights carried out by lower policemen are more an impediment to an honest life than a support to it. Therefore it is gradually growing obsolete. (Secs. 31-42.)

At last we have to mention the confiscation and the destruction of the products of a crime.

Our code does not know a general system of aggravations of punishments, but in a few cases a second offense is a cause for increasing the punishment. Theft, fraud, and receiving stolen goods are punished more heavily for a second recommitment—robbery for a first recommitment, when the former offenses are committed within the Empire; but if the last offense is committed after an elapse of ten years after the expiration of the sentence passed for the previous offense it does not cause an increase. (Secs. 244, 245, 261, 264.)

On the other hand, we adopted the French system of "circonstances atténuantes" (mitigating circumstances), which is a universal one in the French code, but applied only in special cases (and certainly without regard to a sensible system) in our German code—as, for example, not in case of murder.

In some cases the prosecution can take place only when the injured person demands it. This right of complaint given to persons over 18 years, to the parents and guardians of those under 21, and to a husband for his wife in case of insult (sec. 195) is lost after three months' time from the day when the injured person gets knowledge of the act and of the person of the author. A complaint directed against one of the participants gives a right of prosecution against all participants. Only in some cases, where it is specially mentioned, the complaint may be withdrawn as long as no judgment is delivered. The number of these cases is considerably diminished by the amendment of 1876. Withdrawal was generally allowed before the law.

Reasons for introducing this right are: The relationship of the injured person and the author of the crime; the insignificance of the act (insult, bodily injury), or respect for the sentiment of the injured person, as in case of seduction, bigamy, etc. The consequence of not

using the right is not that the act becomes lawful; it remains unlawful, only case prosecution can not take place. (Sects. 61-65.)

Criminal prosecution and the execution of punishments are precluded by prescription, which in the first case is extended according to the maximum of the provided punishment from three months up to twenty years; in the second case, according to the sentence pronounced, from two to thirty years. In the first case prescription begins on the day of the committed act, in the second on the day when the judgment became valid. The rule of the first case, "that the beginning of the prescription is independent of the time when the results of the unlawful act are realized," is much attacked as doubtful and unsystematic. Prosecuting acts of the judge or the execution officer interrupt both prescriptions, so that a new course begins.

When the prescription is ended, the unlawful act does not become lawful, only criminal prosecution is then forbidden. While the necessity of a system of prescription is undisputed, there is doubt of the necessity of dividing the system as our code does. (Sects. 66-72.)

Naturally a punishment is precluded by the death of the prosecuted person, but our code does not state this rule expressly and makes the one above-mentioned exception for fines. Punishment ought to be precluded by incurable insanity, but our theory does not accept this maxim.

Punishment ceases through a pardon, the power of which is vested in the heads of the different States. But this undisputed right, as well as that of abolishing a prosecution before any sentence is pronounced, which still exists in some States, is not regulated by our code.

A last point in the system of punishments is the question, How punishments concurring in different acts are to be calculated? Our code speaks of "concurrence of a plurality of unlawful acts," when an act or omission is made criminal in different ways, or when a person is convicted of two or more offenses. But our doctrine is not at all unanimous about the nature of these conditions. There are two distinct cases; in the first we have one act but more than one legal standpoint for our legal judgment (an act is fraud and forgery, or assault and attempt at rape); in the second we have more than one quite different, independent act, but one sentence punishing them at the same time. In the first case we must distinguish those conditions where one of the different standpoints gives only emphasis to the other, those where one of the different laws combines two or more others (as house-breaking combines theft and damage of property; robbery combines theft and violence), and those where no single standpoint is absorbed in its totality by the other (as when an act is fraud and forgery, and assault and bodily injury, or counterfeiting of money and fraud). Under the first condition (the so-called "legal concurrence") only the special law is applied, whether milder or more severe—the "combination" absorbs the single laws. But the third condition, the so-called "ideal concurrence," is disputed, and this alone is settled in our code. While some demand that all the different laws should be applied here, our code says the act is punished under the severest provision alone. The same rule is observed by our courts when one act violates the same law several times (as when at one time and through one act several goods are stolen from different proprietors, or a fraud is committed against several persons; a bullet kills several persons); here the one act is punished only one time, but, naturally, the punishment may be a severer one. (Sec. 73.)

The second case, "real concurrence of several independent unlaw-

ful acts," is in our theory and by our courts distinguished from the other case, where several acts of the same kind, naturally independent of one another, are deemed as forming one offense. We use this construction when the same act is committed against the same object at several different times, but realizing only one criminal intent—and we speak here of "one continuing act"—punishing it only once, as the combination of all punishments might be too severe. (Several thefts against one person.) This construction, though not mentioned in our code, is still used by our courts.

Nothing of that kind occurs in a "real concurrence." Here a person is convicted of two or more quite independent, distinct acts by one sentence, or they at least are all committed before the time that one of them is punished. They have to be punished all together, but such an "accumulation" might be unnecessarily severe, and therefore our code prescribes a different method. When several sentences affecting liberty are combined, only the severest punishment is fully applied, the others only concur in aggravating the first one. The combined punishment can not be so high as all the single punishments would be if added one to the other, and never can be longer than fifteen years' penal servitude, ten years' imprisonment, or fifteen years in a fortress. But confinement in a fortress is never absorbed by imprisonment (it can never go aside of penal servitude, which, as affecting civil privileges, would absorb the "honorary confinement") and arrest, never by any other punishment; several different punishments, consisting in arrest, are simply added to one another, but never can exceed the limit of three months, and fines are always simply added to one another. Such a system certainly can not be recommended, and can not be called a simple or clear one, though probably the Anglo-American system is not satisfying, either. (Sects. 74-79.)

When, in case of ideal concurrence, the one punishment absorbs all others, additional punishments can be taken only from the absorbing law. But in case of real concurrences, an additional punishment consisting with one of the concurring acts can be applied in the final judgment.

In our theory the definition of an unlawful act,<sup>1</sup> the motive, the question of evil intent and negligence are much discussed; but our code does not deal with these questions, so often arising in our courts, as a code can never be a system.

The general part of the code only regulates, besides the matters still treated here in our former chapters, in special chapters—

- (a) Reasons excluding or mitigating the punishment;
- (b) The attempt;
- (c) Participation.

But the first of these chapters combines subjects theoretically differing from one another, and perhaps their practical combination is of no great value. It treats not only the question of complaint and prescription, but those of criminal capacity—of evil intent in one single point, that of mistake—of unlawfulness and punishability.

(A) The very vexed question, how a code ought to regulate the point of criminal capacity, is answered in two lines—as to maturity and as to mental sanity. Criminal capacity is deemed as existing in a sound person over 18 years of age. But there is no legal presumption for it, and when there exists any doubt, criminal capacity has to be proved; no burden of proving irresponsibility is upon the accused person. It

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<sup>1</sup>"Act" in our legal vocabulary includes "omission."

never can exist in a child under 12 years. This person can not commit a crime, but would be only an innocent agent. It is doubtful whether capability exists in a youth over 12 years but under 18 years, and has to be proved in every single case. Such a person is not punished unless it be shown affirmatively that at the time of the act committed the person had sufficient capacity to know that the act was a punishable one. This is the so-called "question of discernment," adopted by our code from the French law, but gravely attacked by our theory. We point to the fact that criminal capacity is not only a matter of intellect, but of moral will. Intellect, which according to the rule of our code has to be investigated alone in case of youth, may exist, but the moral will is not yet developed, which is just as much an element of criminal capability.

Children and youth acting without criminal capability may be sent to reformatory institutions. They can be submitted even to enforced education before committing an act, when they show moral depravity, according to some newer State laws. Criminal minors are submitted to milder punishments; they never undergo capital punishment or penal servitude, and reprimand is a punishment for them "in especially light cases."

There can not be any doubt but this is a very poor system, and the reforming element is not yet sufficiently regarded by our code. (Sects. 55-57.)

The same provision as for a youth is made for a deaf-mute. (Sec. 58.)

On the other hand, our code prescribes that "there is no criminal act if the author, at the time of the act committed, was in a state of unconsciousness or mental insanity, by which his free volition was excluded." (Sec. 51.) The code does not give a definition of these different states of mind, leaving that to the physician.<sup>1</sup> But it is to be regretted that it speaks of "free volition," which is so much discussed now and not at all universally adopted as really existing. This question has to be solved by the court, and never by the physician who serves as expert in such cases. Yet we can acknowledge that the judges might very well operate with the rule of our code.

(B) Section 59 runs as follows: If an alleged offender did a punishable act without knowing the state of facts which compose the legal offense or aggravate its punishment, he is deemed to have acted under that state of facts which he believed to exist. Negligent ignorance of such a fact is no excuse for offenses committed from negligence. This rule is quite unnecessary, for, as the element of evil intent is knowledge of the facts belonging to the act committed, not knowing these facts must by itself preclude evil intent. But ignorance of the penal law is no excuse. Strangely, and in order to overcome too great a severity, our jurisprudence calls ignorance of a civil law an "ignorance of fact," which is a reason for excuse.

The point of evil intent is still mentioned in our press law (May 7, 1874), when we have a special rule for presuming that there exists evil intent in the authors of printed matter containing some criminal act.

(C) Unlawfulness is a characteristic not only of criminal acts, but of those forbidden by civil law. Now, an act otherwise unlawful may, by certain reasons, be in accordance with law. But only one of these reasons is specified by our code, that of self-defense, and this in the same way as almost any civilized nation does it. Section 53: "There is no criminal act whenever the act was necessary on account

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<sup>1</sup>Certainly drunkenness in the highest degree excludes "free volition."

of self-defense. Self-defense is the defense necessary to protect the person itself, of another, or from an imminent unlawful attack of any kind. Doing more than is necessary is not punished, if the person acted from confusion, fear, or terror." So the conditions for the legal defense are: An attack which is immediately imminent, not in the mere future, and not over, which is unlawful, but an attack on any legal interest of anybody. The defense must not be carried further than necessary, but on the other hand our law does not demand that it ought to be proportionately adequate to the attack. One can kill a pickpocket, if necessary. There is no difference between perfect and imperfect defense, a question rightly left to the judge.

Self-defense and self-help is, according to the needs of our time, extended by our new Civil Code (secs. 226-231) and allowed against dangerous property as well as against persons.

The other reasons why an act is not unlawful, though harmful, are not mentioned in our code, but to be taken from other statutes: (1) A legal command in some seldom cases, as a military command; (2) the right of an officer—executing a punishment, opening a house by a judicial officer, beating by a teacher; (3) consent of the injured person, where this is possible.

(D) Aside from the unlawfulness, an act must be declared punishable through the law. In some cases an act otherwise punishable, is not punished, though it remains unlawful. An act is not punished as a criminal one if committed in a condition of urgent necessity, which is not caused by the author of the act and is inevitable in any other way, in order to protect life or limb of the author, or of a relative of his, from an immediate danger. (Sec. 54.)

At last I must mention section 52, which provides that there is no criminal act if the author was compelled to do the act by irresistible force or by threats of an imminent, otherwise inevitable, danger for life or limb of the compelled person, or of a relative of his. The first part describes an act which is a mechanical one. The second part describes an act allowed as committed under conditions of necessity. This law is not very well shaped. And so there the question remains unsolved whether an attack made by an animal or by an alien gives the right of self-defense or only of self-help as in inevitable necessity. Our jurisprudence allows self-defense against the attack of an alien, but the controversy is unsolved in the other case; it ought to be solved in the same line.

In the definition and punishment of an attempt our code follows partly the French law concerning the definition, partly the German idea concerning the punishment.

Attempt of an offense is an act realizing the specific intent of committing a crime by means of facts known at the commencement of executing that crime. In this way attempt is distinguished from mere "preparatory acts." But the meaning of the words "commencement of execution" is one of the unsolved controversies of our law. I think we may say the execution of a criminal act begins in realizing any of its elements as enumerated in our code, thereby showing the magnitude and proximity of the act. So the different chapters do no longer enumerate single acts which might be called "attempts."

We speak of attempt, when the criminal act is not fully completed, without any distinction how far it is completed, or why there did not come out any result. The French distinction of "délit manqué" and "délit tenté" is unknown to our code; and so a man who did all he could do, and had to do, in order to kill his neighbor is punished only

for attempt of murder, when the bullet by mere chance did not hit or kill. The German law punishes every attempt of every felony, that of a misdemeanor only when it is specially provided by the law, and never that of a contravention. And the penalty never reaches that of the accomplished act; but the attempt of a felony, therefore, does not yet become a mere misdemeanor, though it may be punished like it.

Attempt is not punished if the offender voluntarily desists from the actual commission of the intended crime, without any hindrance from other parties, or if the author himself averted the effect of his criminal act at a time when the act was not yet discovered.

The very vexed question of the so-called unrealizable attempt—attempt without adaptation of means—is intentionally not solved by our code, which is highly to be regretted. But the jurisprudence is about the same as the English-American one.

As everywhere some attempts, or even preparatory acts—i. e., of high treason—are made substantial crimes in our code. (Sects. 43-47.)

Participation, in the German law, differs widely from that of Anglo-American law. We have no difference between participation in felonies and misdemeanors, no degrees of principals. But here, too, our doctrine is in favor of a reform. At first, I have to state that "accessory after the fact" is now, contrary to the old common law, unknown to our code, and in a more sensible manner treated as "favoring" among the single criminal acts. Participation is possible only before the act is accomplished, only in the casual line of an act. And here our code has three different species:

(1) "Cooperation" is participation when more than one person actually commit an act together. They are all punished as principals. Execution means here executing any of the legal elements or parts of the act, whether a principal one or not. But execution as cooperator wants the will of the actual author. Our jurisprudence, carrying this principle too far, punishes as cooperator even a man who assisted the author as guard, if only his will was the same as that of the principal actor. Punishment of one of the principals does not depend upon that of the others.

(2) "Assistance" means intentionally aiding the author in his act as counsel or by a fact, but is punished only when a felony or a misdemeanor is committed, and only according to the rules of the attempt. That assistance is punishable, the principal act must be a punishable one and must be really committed. But here, too, the punishment is independent of the principal one.

(3) "Instigator," "abettor," is a person who intentionally procures another to commit intentionally any criminal act by means of presents, promises, threats, an error, or any other method. Instigating is punished just as the act abetted, but only when the act is committed as a criminal one. Therefore, inducing a child or insane person to commit some criminal act is committing an act indirectly, by means of an innocent agent. Counseling to suicide, unfortunately, is not punishable in our law. No exception to these rules is made for any section of the law.

At last our code has a rule that if the law punishes an act severer or less severely than ordinarily, according to the personal conditions of the offending person, these conditions count only for that participant in whose part they are realized; so, i. e., a participator is a juvenile person or a son of the murdered, or an officer, or committing a second offense.

The rule that an accessory may be prosecuted only with the principal is unknown to continental law.

Section 49a closely follows the Belgian "loi contenant des dispositions pénales contre les offres ou propositions de commettre certains crimes," July 7, 1875, and is certainly not a very clear rule. "Anyone inviting another to commit a felony or to participate in a felony, or anyone accepting such an invitation, or anyone offering to commit a felony, or to participate in a felony, and anyone accepting such an offer, is punishable. But invitation or offer must be written or connected with some special advantage." This is a sort of conspiracy, otherwise not provided for in the German code. (Secs. 47-50.)

The second part of our criminal code enumerates the single offenses. Its chapters are arranged not very systematically, but so that they begin with the criminal acts directed against the state, the security and authority of the state and its officials, and all public conditions, as money, morality, religion. Then the offenses against the individual are enumerated, beginning with assault and the grave acts against life and body. Then follow the acts against rights of property. In special chapters are treated the so-called "crimes causing a common danger," crimes connected with office, and at last the petty contraventions.

Though our doctrine adopted another and probably more sensible system where the division between the attacks against the community and those directed against the individual is clearer stated, we had better follow here the system of our code, mentioning in the right order the different special laws.

Here, more than in the first part, we remark the consequences of history, which leads us in many points to laws not suiting another country. Then we find that German as well as all continental European legislation is characterized by very concise language. Its abstract thinking makes it shorter in expression, though it is clear enough for any trained mind. And the German Criminal Code never provides for any matter of evidence or procedure, leaving that altogether to the code of criminal procedure.

The first chapter deals with "treason and high treason." (Secs. 80-93.) High treason is murder or attempt to murder the Emperor or a German governing prince, punished with death; then any deed leading to a violent change of the German constitutions or the territory of the States or the Empire. An appointment or conspiracy and public instigating to do any of these crimes, even any preparatory act, is punishable, too.

The word "public" in our code generally characterizes an act committed in such a manner as to let anybody, an unlimited number of persons, take part in it. (Secs. 110, 111, 184, 200.)

Treason is either committed in regard to war or is a so-called "diplomatic treason." The first is a German instigating a foreign government to begin war with Germany, helping the enemy, or taking arms against Germany during a war, and especially betraying military secrets to the enemy. Foreigners committing these acts are treated according to the laws of war. A law, dated July 3, 1893, punishes spying in a still further manner, specially preparations for treason. Diplomatic treason consists in the publishing of state secrets or the like, dangerously suppressing or destroying valuable diplomatic papers, and conducting a state affair with another government to the disadvantage of the represented government.

The second and third chapters have provisions for assaults, real and

oral, against princes and members of governing houses. (Secs. 94–101.)

The fourth chapter punishes “hostile acts against friendly nations,” i. e., nations having friendly relations with our own country. (Secs. 102–104.) These are acts corresponding to high treason and assaults of a foreign governing prince, but prosecution depends upon a demand of the foreign government, assault of a diplomatic representative of a foreign government, and malicious destroying, spoiling, damaging a public sign of authority of a foreign government or mischief at its embassy. (This section, 103a, corresponds to a similar section, 135, protecting German emblems of authority.)

The fifth chapter speaks of “criminal acts in regard to the use of civil rights.” (Secs. 105–109.) Here, closely following the French code, are enumerated: Violence against legislative bodies of the Empire or a federal state, violently hindering a member of a legislative assembly or a German citizen from fulfilling his duties or public rights, falsifying the result of public elections, buying or selling votes, and bribing voters in public affairs.

The sixth chapter is entitled “Obstruction of governmental authority,” and protects the execution of the law. (Secs. 110–122.) Public invitation to disobedience to the laws—even foreign laws or even to civil laws (i. e., to begin a strike<sup>1</sup>), and instigating a soldier to disobedience, are the first acts. Section 113 punishes anyone who by force or threats resists an officer acting rightfully or who assaults such officer during the lawful exercise of his office. And correspondingly are protected persons summoned to the assistance of an official, and even proprietors and guards of woods—these persons because they are especially exposed to such attacks. Section 114 punishes the coercion of an official in his duties by means of force or threats. Section 115 punishes willful participation in a tumultuous assembly, where such acts as stated in sections 113 and 114 are committed, and especially the leaders and those who commit the acts. Section 116 punishes anyone who takes part in a public meeting and does not obey the command of the competent officer dissolving the assembly.

Sections 120–122 mention the freeing of a prisoner. A prisoner who escapes or breaks out of the prison is not punished, unless several prisoners combine and try to escape by means of force. But anyone who rescues a prisoner or who assists a prisoner in escaping, and anyone who intentionally or by negligence aids or permits a prisoner to escape, when the prisoner is in his lawful custody, commits a crime punished independently from the crime committed by the rescued prisoner. Later on our code mentions especially the official person who commits the same crime. And then are punished prisoners tumultuously assembling and assaulting or resisting or compelling the prison officers or guards.

In the following chapter are combined different acts against public order. (Secs. 123–124.) The first act enumerated is the breaking into a dwelling, locked room, or business room, without any right of entering, with or without arms, by one or several persons, and the public riotous gathering doing those acts. These acts include the Anglo-American “burglary,” but are far wider than this offense. Closely follows an old German crime, “breaking the peace of the

<sup>1</sup>Here our Reichsgericht is not unanimous. Certainly the decision is much to be regretted. Cf. Entscheidungen, vol. 20, pp. 63, 150; 21, pp. 192, 299, 301, 355; 22, p. 185, 24, p. 189.

country," riotous public assembling, and committing violence against persons or property. Section 126 punishes disturbing the public peace by threatening certain crimes; section 127, forming or commanding an armed troop or providing it with arms without having a right to do so, or joining such a troop; sections 128 and 129, participating in unlawful conventions; sections 130-130a mentions the disturbance of public peace by instigating different classes of society to commit violence against one another, and especially if done by a clergyman. This last section is the result of political actions against the Catholic Church in the beginning of our Empire.

The following sections mention assaulting public institutions—unlawful acting under the pretense of being an official person, spoiling, destroying, damaging, concealing of documents or other things publicly preserved, malicious injury to publications of commands or advertisements, malicious injury to a public German sign of authority. Section 136 protects official seals against breaking or injuring, when the seal is affixed to close, mark, or seize property. Section 137 punishes the deliberately withdrawing of seized property. Sections 138-139 mention two public duties: the duty of a juryman or witness to appear before the court, violated through false pretenses, and the duty of everybody to give notice of some specially enumerated crimes he gets knowledge of, as long as they may be prevented (one of the few crimes consisting of real omission).

The following sections punish disobedience to the military service, where maiming oneself to escape performance of military duty is one of the offenses, inviting to emigration under false pretenses, and violation of orders given to prevent sea disasters. A law of June 9, 1897, relating to emigration, calls it a felony if a female is invited to emigration by means of false pretenses with intent to bring her to an immoral life.

The eighth chapter (secs. 146-152), "Offenses relating to the coin," are either felonies or misdemeanors. Everyone commits felony who makes counterfeit domestic or foreign coin or paper money or "money assignations" with intent of using or bringing into circulation the counterfeit money, or who with similar intent alters current or condemned coin in order that it passes for a higher value or for current coin, or who brings into circulation such counterfeit coin prepared by himself without the above-mentioned intent or after he procured it. These felonies are punished even if committed by a foreigner without the German Empire.

Classed as misdemeanor is giving away false money received as genuine but recognized as false, bringing into circulation any genuine metal coin after diminishing it by filing and cutting or bringing into circulation filed and cut coin habitually or in concert with the filer and cutter, the making or procuring punches, dies, stamps, patterns, etc., adapted for manufacturing money and intended for a felony relating to the coin, and using them. Manufacturing those stamps, etc., without due authority but without a felonious intent, making any cards resembling paper money, is a mere police contravention. (Sec. 360, pars. 4 to 6.)

The ninth chapter is entitled "Perjury," but might be better called "false swearing." Intentional perjury is a felony when the false oath is sworn by a party in a judicial proceeding or by a witness who gives a false assertion upon an oath before a magistrate authorized to administer an oath, even if the swearing person is not yet legally capable

of swearing, even if the false facts are quite insignificant. (Secs. 153-163.)

Classed as misdemeanor is the intentional false assertion given instead of an oath before a competent magistrate, and a false oath sworn out of carelessness, and intentionally acting against a promise given to a judge under oath.

Trying to instigate a person to perjury or a false assertion is punishable, as well as influencing another so that he swears innocently a false oath.

The penalties for perjury or false assertion of a witness are reduced (1) if speaking the truth would cause a prosecution against the swearing person, (2) if the false fact was told in favor of a relative; and the same reduction takes place if the swearing person withdraws the perjury before he is prosecuted and before damage is caused to anyone.

The tenth chapter calls intentionally "false accusing" a misdemeanor. (Secs. 164, 165.)

The eleventh chapter enumerates "Offenses relating to religion," which by our theory and partly already by our code are deemed as offenses against public peace and are much restricted compared with other laws. (Secs. 166-168.)

Everyone commits misdemeanor who by blaspheming God publicly creates a scandal, or who publicly insults a recognized religious denomination or its institutions, or who is guilty of malicious and depraving mischief in a church or a religious assembly room, or who intentionally hinders anyone from holding or who hinders or disturbs service itself, and who disturbs the peace of the graveyards or takes away a dead body.

Blasphemy itself or heresy are not punished criminally in Germany. "Sabbath breaking" is a mere police contravention.

In the twelfth chapter (secs. 169, 170) altering or oppressing the personal rank of a child or anyone else, and inducing another to contract an invalid marriage by false pretenses is deemed a misdemeanor.

The thirteenth chapter enumerates the "Offenses against morality." (Secs. 171-184.) It begins with bigamy as felony of the married and unmarried person, and adultery is punished as a misdemeanor in both partakers if divorce is caused by it. Incest is punished as felony, but not if the parties are under 18 years.

They commit a felony who commit obscene acts with their wards, pupils, or with persons intrusted to them. Sodomy is punished as a misdemeanor if committed between male persons or between man and animal, but not the attempt at it.

Felony is committing obscene acts with a female, using violence with a female who is unconscious or insane or with any person under 14 years, and especially rape, carnally knowing any female by means of violence. Higher penalties are prescribed if death is caused by these last acts.

Seducing any female to carnal connection by false pretenses or defiling a female under 16 years of good character is punished on demand of the injured person or her legal representative.

Procuring opportunities for carnal immorality is punished only under some graver conditions.

Creating a public scandal by obscene acts and publishing obscene pictures is a misdemeanor.

These laws are to be altered now, so that procuring opportunities for immorality is more severely punished, females are better pro-

tected, and the public will be better secured against obscene publications. Psycopathology shows that many of these acts are committed by insane persons and that the law has to take care not to bring grave danger upon any unfortunate creature.

"*Insult and defamation*" (chap. 14, secs. 185-200): In this matter continental European law differs widely from Anglo-American ideas. We have no "libel," as the Anglo-American law does not know the idea of "insult."

The German code does not give a definition of insult, which is a light misdemeanor. Theory and jurisprudence, though differing in many details, call "insult" any attack on human reputation, so that the attack may vary, according to the reputation which a man has earned in social life. The attack can use words, printed or spoken, pictures, or deeds, or gestures; and even true facts uttered in an insulting form may be sufficient for punishment. Insult is also "speaking ill of another," and here the defendant must prove that his words are true; even his firm belief that they were true is not sufficient excuse. "Defamation" means making an untrue statement in regard to another person against better knowledge, if this statement may expose the person to contempt, public ridicule, or endanger his credit.

Insults are not a misdemeanor if they are a fair criticism of scientific, artistic, or industrial works, or made in the benefit of "lawful interests" or officially necessary. "Lawful interests" are those of the author of the insult or of any other person whom he may have a publicly acknowledged interest to protect. Here the press finds its protection against prosecution, though it is not a strong one.

The condemnation for publicly uttered insults or defamation may be published by the prosecutor. Prosecution arises from the complaint of the injured person; the official superiors of official persons have the right of complaint independently of the injured person. If an insult is immediately returned, the judge may declare both parties, or one of them, free from punishment.

In the fifteenth chapter, sections 201-210, "duel" is called a misdemeanor and punished as an act not touching the honor of the author with confinement in a fortress. The code enumerates: Challenge to duel with deadly weapons and acceptance of it; delivering of a challenge; duel itself with deadly weapons; killing in a duel; duel without assistance, and intentionally instigating or inciting to a duel. No punishment is inflicted if, after a challenge, the duel was given up voluntarily, or to the assistants if they earnestly tried to stop the duel, and none to seconds, witnesses, or surgeons. Homicide or bodily injury committed by means of deliberate transgression of the rules of dueling are punished principally according to the rules of those offenses. A previous appointment is not a requisite of duel in the German law.

The sixteenth chapter treats "offenses against life" (secs. 211-222). Where formerly murder and manslaughter were defined similarly to the English law, the German code has another distinction, but certainly not a better one. Premeditation does not cause the difference, but "deliberation during the execution of the act," so that even a premeditated homicide may be manslaughter when it be executed without deliberation, which means without cold and tranquil mind. Murder therefore is willful homicide if executed with deliberation, and is punished with death.

There are no extenuating conditions considered here, and there do

not exist any presumptions for murder. Manslaughter, punished with penal servitude from five to fifteen years, is less punished if caused by a provocation of the killed person; higher, if committed by the author of another crime in order to protect himself; and higher as homicide of a relative of the ascending line. Suicide is not punishable according to continental European law. Homicide is a special misdemeanor if the author is incited by the earnest and expressed demand of the killed person.

Concealing the birth of children is not punishable; but a mother commits a felony who kills intentionally her illegitimate child at or immediately after birth. Punishment here is penal servitude not under three years, but extenuating conditions are admitted.

Willfully procuring abortion is punished if caused by the mother or by another person with or without consent of the mother, and higher if done so for money. Taking, providing, or administering medicine to cause miscarriage to a woman who is not pregnant is one of the unrealizable attempts punished in German courts, though not specially mentioned in the German code.

Exposing a person who is helpless from tender age, infirmity, or illness, or intentionally leaving such a person in a state of helplessness, if the author is legally bound to take care of the person, is a misdemeanor.

Causing the death of another through carelessness in any way is a misdemeanor. The code does not specify the cases of negligence. Here, as well as in the similar cases of bodily injury, the punishment is a higher one if the author neglected special duties in committing the offense.

“Justifiable homicide” is not mentioned; the reasons of justifying any act are of a general character, and partly already mentioned among the general provisions, partly not provided for in the code.

“Bodily injury” (chap. 17, secs. 223-233) is defined by our code as bodily ill using or damaging the health of another, and is punished as a misdemeanor if committed intentionally or from negligence without regard to the consequences. “Ill using” does not mean any slight harm, but must be of a certain higher degree. Bodily harm may be an insult. It is punished as a police contravention if committed on a public place by some states-legislations, and it ought to be by our code. Aggravations take place at the intentional offense (1) if the means of the act are dangerous, though the results may be absolutely harmless; (2) if there are caused grave results, especially death, either casually or with the intent of the author (like “maiming”). Here I mention the characteristic of our criminal legislation of increasing the punishment when some not intended consequences follow the offense.

Two special offenses are to be mentioned here:

(1) Participation in an affray or an assault is punished as a misdemeanor if the death or a heavy bodily injury is caused by the affray or assault.

(2) Administering poison or the like to another with the intent of injuring his health is a felony. Its difference from the attempt of homicide has to be noted.

Bodily injuries are prosecuted only on demand if they are light intentional ones or caused from negligence.

Here, as well as with the insult, our code prescribes that on the request of the injured party a mulct may be awarded by the judge instead of civil damages.

The difference between the German law relating to bodily injuries and the Anglo-American law is noteworthy; the German sense of the word is much wider and includes battery, most acts of assault, and maiming.

I add the special laws against the adulteration of food. Their object is not only protection of life and health, but perhaps more protection of commerce and property against fraud. They are in Germany of the same character as almost everywhere. Probably because these subjects not only want criminal legislation but police regulation, they are treated in special laws, not in the code itself.

The eighteenth chapter, sections 234-241, speaks of "offenses against personal liberty," and contains offenses corresponding to the Roman and old common law offense of "vis," which was of a general and subsidiary character, and under this head the German code speaks of some acts of the Anglo-American assault.

The first felony mentioned is kidnaping, committed by anyone who gets into his power a person by treachery, threat, or force, with purpose of exposing the person in a state of helplessness or of bringing him in slavery, bodily service, or foreign military or naval service. Our code does not know the offense of slave trading, which is, according to the Brussels antislavery conference, made a felony by a law dated July 28, 1895. This punishes intentional participation in a slave kidnaping enterprise and the slave trade or participation therein, even if committed in a foreign country, but the words are not explained by the law.

Taking away minors from their parents or guardians by treachery or the like is a misdemeanor, and if committed with the intent of using the minor for begging or from immoral motives or motives of lucre, it is a felony. Assistance to a minor who elopes from his parents is not punished. Taking away a woman against her will by threat or treachery or force with immoral purposes is a felony, needing a complaint of the woman for prosecution. Taking away a minor female, being unmarried, with her consent, but against the will of her parents or her guardian, for immoral purposes or for marriage is a misdemeanor, punished on complaint and only after the marriage of the abductor with the female has been declared invalid.

Depriving a person of liberty in any way, so that the person can not move freely, is a misdemeanor, or in worse cases, producing a worse result, a felony.

Anyone who compels another unlawfully by means of force or threatening so that the other commits, suffers or forbears an act, is punished for misdemeanor. This crime is of a subsidiary character. Jurisprudence declares that a crime is committed if the means are unlawful, though the purpose of the author be righteous.

Threatening another that a felony may be committed against him is a misdemeanor, oftentimes a most trivial one, which ought to be prosecuted only on demand.

"Theft and embezzlement" are treated together in the nineteenth chapter, sections 242-248. And here the German law differs in that way from the Anglo-American law, that it does not know the wider sense of larceny and all the specialties of this crime. Theft and embezzlement are quite different crimes, independent from one another, but both defined abstractly.

"Stealing" means taking away any movable thing belonging to another with the intent of unlawfully appropriating it; "embezzlement" is committed by anyone who unlawfully appropriates a mova-

ble thing not being his own, when he actually possesses it. Both acts are misdemeanors, but theft incurs higher degrees of punishment if committed in a specially dangerous way. "Burglary" is mostly punished in Germany as qualified theft, and embezzlement is punished higher if committed by a trustee.

Both acts are punishable, even if not committed "lucri causa," a difference from the older law. Therefore our courts punish a man as a thief, though he paid for the stolen thing or thought he could demand the value of it. Our code does not speak of "lost property." Retaining lost property may be punished as theft or embezzlement.

A strange question now came up—whether electricity might be the object of stealing—and our theory is quite right, saying that in the sense of our law electricity is not a "movable thing," but a power. Therefore electricity needs a special protection by altering our code.

Stealing food for immediate use is made a mere police contravention.

"Robbery," treated in the twentieth chapter, sections 248–256, is a theft committed by means of violence or by threatening immediate danger to life or limb; and together with it is treated extortion; that is, compelling another to do, suffer, or forbear an act by means of violence or threats in order to gain an unlawful material advantage for the author himself or another. In extortion there is to be remarked the difference between this crime and compulsion or fraud. The obtaining of property is not necessary for the consummating of the crime.

Then come "favoring and receiving" (secs. 257–262), here placed in a very unsatisfactory manner, as favoring is a general crime committed against public justice, and receiving only a crime against property. Favoring, formerly described as a mode of assisting, is the crime committed by anyone who knowingly assists the author or participator of a felony or misdemeanor after these crimes are committed, in order either to rescue the author from punishment or to secure the advantage of the crime to the criminal. This favoring is not punished if committed by a relative of the favored person in order to rescue him from punishment. Favoring after a theft, embezzlement, or robbery is falsely termed "receiving" by our code when it is committed for the advantage of the favoring person.

Real receiving is any getting into possession or helping to bring away things obtained by a punishable act, and our jurisprudence says that receiving is punishable only if it concerns the things obtained themselves, not their value. Naturally anyone who practices receiving, habitually or as a trade, is punished severely with penal servitude.

"Fraud and breach of trust" are the subjects of the twenty-second chapter, sections 263–266; and here we have quite a particular crime, different from the old "falsum" and from the Anglo-American fraud. Formerly our law knew a systematic unit "falsum," falsifying anything, the truth of an oath, deeds, coins, food, or the confidence of another. But now we know that by the same method many different objects are attacked, and therefore the law gave up the old sense of fraud, so that some Anglo-American crimes, as false personation, i. e., are no longer distinct crimes, but only means of other crimes, attacks against different objects. The Anglo-American system of enumerating all the single cases of criminal acts is not observed by the German law. "Fraud" is a simple crime against property, and means injuring the property of another by causing an error, and any such acting is fraud and never theft or embezzlement. In particular, fraud is committed

by anyone who, in the intent to procure an unlawful material advantage for himself or a third person, diminishes the property of another, causing or confirming a mistake by means of misrepresentation of untrue or distortion, or suppression of true statements. Fraud in order to obtain credit by the false pretense of being a person with credit is regarded as real fraud by our jurisprudence, though theory says that the mere pretense ought to be sustained by some material statements, and that this sort of fraud ought to be mentioned specially. Here, as well as in theft, fraud is to be punished, though the property of the injured person is not diminished in its value.

Certainly this idea of fraud does not cover all the acts which ought to be punished, but it is the right idea and only wants to be better worked out. It contains all the many specific acts, enumerated by American codes, of fraudulent conveyance, fraudulent insolvency, frauds in relation to insurance companies, false personation, false weights and measures, frauds in the sale of passage tickets, etc.

In a wrong place, considered with reference to classification, is mentioned the crime of burning property which is insured, or destroying a ship with the intent of defrauding the insurer thereof.

Breach of trust is acting to the disadvantage of special interests property, business, etc., intrusted to the confidence of the criminal actor, either with or without the purpose of obtaining material advantages. Our code here punishes certain guardians, trustees, agents, and some special laws add the agents and members of the committees of certain companies.

The twenty-third chapter, sections 267-280, is entitled "forgery of documents," and deals with a very difficult matter. A particularity of our code is that forgery alone is not sufficient to constitute the whole crime, but this is consummated only with the use of the forged document, a difference from the crime of counterfeiting money. Anyone is punished who with unlawful intent forges or fraudulently writes and then uses for the purposes of deception a German or foreign public document or a private document which is important to prove rights or legal relations, and this misdemeanor becomes a felony if committed with the intent of procuring for oneself or another a material advantage or of causing damages to another. Knowingly using a false or forged document is punished in the same way.

As our code does not define the meaning of "document," this word is much discussed. Our jurisprudence declares a document any dead material containing an idea by which it might prove any legally important fact.

Quite a different crime is committed by a person who willingly causes declarations, negotiations, and the like to be wrongly attested or registered in public books by an official person who does not know that his registration is a wrong one.

Besides these crimes the chapter mentions further:

(a) Destroying, damaging, or suppressing a document, which is a partly or totally foreign one, with intent of causing damages to another, or a boundary mark with the same intent, the old "crimen termini moti;"

(b) Forging, fraudulently manufacturing, or knowingly using false stamps, stamped paper, and similar things, or using such stamps a second time;

(c) Giving a wrong attest or forging an attest on the health of a person under the pretense of being a physician and using the attest in order to deceive an official person or an insurance society;

(d) Physicians who falsely attest the health of a person for use before an official person or an insurance society.

As a mere police contravention is punished the forging of documents relating to the conduct of a person, or the using of such false documents with the purpose of deceiving for one's own or for another person's benefit.

"Bankruptcy" was the subject of the twenty-fourth chapter, and was punished only when committed by business men, but now is made a common crime by the bankruptcy law, February 10, 1877. Our law distinguishes simple and fraudulent bankruptcy as misdemeanor and felony. Both are punishable acts only when a debtor has suspended payment or when a debtor is declared bankrupt by the magistrate.

Fraudulent bankruptcy is committed by any debtor who, with purpose of causing damages to his creditors, (1) concealed or made away with parts of his property, (2) pretended to have certain debts or obligations, (3) did not keep commercial books which he was bound to keep by law, (4) destroyed or concealed his books or kept them so that they are unfit for showing the condition of his property.

Simple bankruptcy is committed by the debtor who, without a fraudulent purpose, diminished his property by luxury, gambling, or trading on differences in goods or stock exchange papers, or who did not keep his commercial books as he was legally bound to do, or who destroyed or concealed them or kept them disorderly, or who did not draw a balance of his property, as required by law.

In the same way a debtor under the same condition is punished who, knowing that he is unable to pay his debts, gives securities or satisfaction to a creditor who has not the right of asking it with the intent of favoring him.

All these punishments are applicable to members of the committees of certain societies.

Creditors and third persons may be either participants in the crime of the debtor or can be punished for specially mentioned acts committed in the interest of the debtor.

A special chapter (chap. 25, secs. 284-302e) is devoted to "criminal selfishness" and "breach of foreign secrets," and here the most heterogeneous subjects are combined.

Anyone is punished who makes a trade of gambling—the proprietor of a place of public meeting who therein allows or conceals games of chance and the arrangement of public lotteries or the like without legal permission. The mere arranging of games of chance is deemed a police contravention only when done so unlawfully in a public place.

Further on are mentioned here: Causing damages to a creditor by doing away with property at a time when there is a reason for execution; taking away one's own things from another who has a right of retaining or using the things; public pawnbrokers who unlawfully use objects taken in pawn; opening foreign letters or documents without authorization; publishing private secrets without authorization by specially mentioned persons of confidence to whom the secrets are intrusted.

And at last this chapter contains the punishment of usury and of cheating or defrauding minors as misdemeanors. But the first of these crimes is added only by a law of May 24, 1880, and of June 19, 1893.

Cheating minors consists in obtaining any promise of payment from them with the purpose of gaining a material advantage and by trading on their thoughtlessness or inexperience.

Usury is the obtaining of rates of interest on any money loan or a similar affair which are strikingly disproportionate to the service ren-

dered, when the usurer profits by the necessity, thoughtlessness, or inexperience of the other person. Our law does not know any maximum rate of interest. Usury is punished more severely if committed so as to conceal the nature of the affair or if committed as a trade or from habit.

"Damage to property" (chap. 26, secs. 303-305) is punished on complaint (1) if done willingly and unlawfully to foreign property, (2) or if caused willingly and unlawfully to specially mentioned public things or things of special public value, whether foreign or not. Arson, though to a certain degree falling under the title of "damage to property," is by our code placed among the crimes involving a public danger.

Here must be introduced some special laws containing crimes against property, and as the first one, the law of May 27, 1896, against unfair competition. Unfair competition is mainly prosecuted by the means of civil law, and even criminal prosecution taking place in severer cases is only rarely a public one.

In three points unfair competition is prosecuted:

(1) As unfair annunciation: Anyone who, with the intent of producing the idea of a specially favorable offer, willingly publishes untrue or deceiving statements in regard to merchandise or industrial products is punished with a fine; in case of recommitment, with prison.

(2) Anyone who, though knowing better, publishes or promulgates untrue statements in regard to business affairs of another, if they may cause damage to the business, commits a misdemeanor.

(3) There are protected business secrets and other industrial secrets. The law punishes (a) anyone occupied in a business of another who unlawfully communicates business or other industrial secrets which are intrusted to him or known to him in consequence of his position, but only if the act is committed during the time of his engagement and in order to cause competition or to cause damage to the proprietor of the business; (b) any other who publishes similarly business or other industrial secrets known to him by an immoral or unlawful act; (c) anyone who uses improper means to discover such secrets.

Two other laws have been passed to protect the public against misuses of the exchange and against fraudulent acts in the safe-keeping of foreign money papers, dated June 22 and July 5, 1897, respectively. The first one, with very far-reaching regulations, indicates some misdemeanors: (a) Influencing the price at the exchange by deceptive acts with a fraudulent intent, and influencing the press by certain maneuvers with the same purpose; (b) instigating others to speculate in exchange affairs not belonging to their business, if done from habit with intent of obtaining a material advantage and profiting by the inexperience or thoughtlessness of the other; (c) a business commissioner who, with intent of obtaining a material advantage, injures the property of his employer by knowingly giving wrong advice, or willingly acts to the disadvantage of his principal.

The second law gives special regulations in regard to the safe-keeping of foreign commercial paper and punishes any business man acting against these rules when damage is caused by his misconduct. Then it prohibits embezzlement of such valuables, enlarging its sense, and at last makes a felony any embezzlement of financial papers in the safe-keeping of a business man, if committed when this person stopped payment or is declared bankrupt.

Besides these laws some others protect firms, trade-marks, and the like, and a large and important ground is covered by the laws con-

cerning authorship and inventions. The typical crime of the first circle of laws comes under the copyright act, June 11, 1870, which means unlawfully reproducing a product covered by the law, done with intent of propagating it in Germany, either willingly or from negligence. The crime of the patent act, April 7, 1891, is knowingly using an invention covered by a patent for business purposes. In all these laws a complaint of the injured person is necessary for prosecution.

The subjects of the twenty-seventh chapter of the Criminal Code, sections 306-330, are "crimes involving a public or common danger," some of which are punished only when a danger is really caused to the public, some others only because the act might possibly endanger the public. The two typical acts here are arson and causing an inundation.

Simple arson is willingly setting on fire specially mentioned property, as buildings, ships, magazines, stores of certain materials, forests, moors, etc., if these are either foreign property or, though belonging to the author of the crime, might spread the fire on foreign property. Arson is qualified (1) as setting on fire buildings appointed for meetings for divine service, a building, hut, or ship used for human lodgment, a room which serves temporarily as lodgment for men and at the time of the act is occupied by men; (2) in a higher degree, when this simply qualified arson is committed with intent of committing a robbery or a murder or inciting a riot, or when there was a man killed who at the time of the arson was in the room set on fire, or when the author tried to prevent the extinguishing of the fire. Punishment ceases when the criminal extinguished the fire before he was detected and before a damage was caused. Arson from negligence is qualified when the death of a person is caused by the fire.

Causing an inundation is punished when done so either willingly or from negligence and when there existed either a common danger for men or for property, but in the latter case to a lighter degree when the author acted with the purpose of protecting his own property.

Endangering the service of a railway line, preventing or endangering the use of telegraph or telephone lines, endangering the shipping by destroying or altering signals, endangering the life of others by causing a shipwreck, poisoning wells or water tanks used by other men or things which serve for common use, infringing the rules given to prevent contagious diseases or cattle plagues, acting against the common rules of the art of building so that there is created a danger for others—these are, whether committed purposely or from negligence, most of the crimes treated in this chapter, which is enlarged by the law against the criminal and dangerous use of explosive matter, June 9, 1894.

The twenty-eighth chapter, sections 331-359, is devoted to "crimes in regard to offices," and begins with bribery. This is punished as a misdemeanor when a person holding an office accepts, demands, or induces the promise of presents or other advantages for an official act which is not against his duty; as a felony when the act involves an infringement of duty. Active bribery is giving, promising, or offering presents or other advantages to a person holding an office or to a member of the army with purpose of inducing him to commit an act which is against his duty. In any other case the briber is not punishable. Specially mentioned are the judges, arbitrators, and jurymen.

Then there are enumerated certain manners of misusing official

power, especially in juridical affairs, and some common crimes as more highly punished when committed by persons holding an office. There may be mentioned undue influence, perversion of justice, preventing legal punishment, false registering, levying taxes or dues which are not liable at all or not to such a degree, opening or suppressing a letter or a dispatch.

The last chapter, sections 360-370, contains the "police contraventions," not in systematic order and not enumerating all of them. There are some among them which belong to any of the previous chapters—some without any general interest. The most interesting ones are (except those already mentioned elsewhere): Causing an improperly disturbing noise or committing a gross nuisance; publicly torturing or cruelly illtreating animals; tramping, begging, or instigating children to begging; prostitution as a trade without police supervision; idleness, when it damages the family of the idle person.

Naturally there exists still a great number of other laws containing criminal provisions impossible to enumerate here. I mention among them only the laws relating to duties and taxes and the laws relating to industry. Besides all these laws, the Military Criminal Code, June 20, 1872, stands apart and deals with special offenses, but does not alter the common crimes and uses most of the general provisions of the common law.

#### CRIMINAL PROCEDURE.

##### A.

Criminal procedure differs more widely in different countries than penal law, and for this reason the German procedure, based, as it is, on the French law, though having adopted some English ideas, is certainly not applicable to countries of English-American law, and the more so because it can not be regarded at present as being a well-developed one. Yet a comparison between the two systems is always instructive, and German jurists never overlook that in the course of the reformation of their criminal procedure the study of English law made by Biener, Mittermaier, Glaser, et al., helped them to discern and to overcome the faults of the French code in adopting it.

We call our procedure "the reformed one," as against the former inquisitorial procedure of the old German common law. This took its origin in the ecclesiastical law of the Middle Ages. The old Germanic procedure was more like that of the civil law, because the individual person himself had the right of prosecuting the criminal as his aggressor. Only where an individual complainant could not be found, or when it was a child or a widow, the king<sup>1</sup> prosecuted in his place, and the provision that certain persons were bound by the king to prosecute any crime they heard of was too weak to last a long time. The system no longer suited a time when the Government was weak and the citizens were not independent enough to help themselves.

In those times the Church developed her power and prosecuted most crimes in her own courts. Here the old Roman procedure, a public one with an individual prosecutor, was in force. In certain cases, however, the bishops, who were the judges, had to prosecute crimes without a complaint brought before them, and as the Church deemed this system well calculated to strengthen her power, it became more and more the regular one; the judge was prosecutor himself, he

<sup>1</sup> In English and American law the person assuming this action for another is called "prochain ami," or "nearest friend."

inquired into the crime, and as it was simpler to do that without publicity, he soon did it all behind closed doors, unbound by any rule. That the prosecuted might confess was the aim of his inquisitor, and if it could not be reached by way of reasonable evidence, torture was tried.

This system was so simple and convenient that it became the practice of all the courts, especially when the jurists, the "doctores," taught it as having its origin in the Roman law.

The great legislative work of Charles V, the *Constitutio Criminalis Carolina*, of 1532—a monument in the history of our criminal law—though calling the new inquisitory procedure an extraordinary, irregular one, treated it as the rule. And so it lasted till our century in all the German States. The procedure was divided into two stages; when the judge had summarily cleared up the facts in the first, he might apply the torture in the second, to get the confession and to hear all the details of the crime as basis of the judgment. He worked secretly, not bound by strict rules, and so the two sections of the procedure were slowly blended into one. The judge was free in determining the crime which he made the subject of his inquisition. The defendant was totally subject to his will and caprice. Counsel for the defendant was not admitted. The judgment was rendered by other judges than that of the inquisition, but based on the written proceedings. When the defendant did not confess, and there was no other evidence of his guilt, he could be discharged, at the option of the judge, who might always take up the case again.

Such a system, practicable only when the judge is a superhuman being, could not last when humanity demanded the freedom of the individual. During the eighteenth century torture was abandoned, and toward the end of it counsel for defenders was even admitted; but when the French code of criminal procedure, adopting English ideas, was issued in 1808 and introduced in some western parts of Germany the people and the jurists demanded a mode of procedure like the French one, the faults of which were soon found out and compared with the better English pattern. In some States public prosecutors were introduced to guarantee the impartiality of the judge; publicity and oral form of the proceedings, a freer law of evidence, and the introduction of a jury system were asked.

But not before the revolution of 1848 were the governments ready to accept the new system. From that year till the foundation of the new Empire almost all the States introduced the new form of procedure, the principles of which are still those of our new German code, as well as of the Austrian code of 1873, though the latter one is freer from relics of the old system still to be found in our German code.

In the new Empire the legislature had the feeling that a uniform system of penal law would not work without a uniform mode of procedure. Therefore drafts were worked out of a law relating to the constitution of the courts and of a Code of Criminal Procedure, together with a draft of a Code of Civil Procedure (1872–1874). The bills were enacted in 1877, but not until some points of difference between Government and parliament were settled.

## B.

The Code of Criminal Procedure for the German Empire bears the date of February 1, 1877, the Code of the Constitution of the Courts that of January 27, 1877; both came into force, together with all the other laws relating to the procedure, on October 1, 1879. Amend-

ments did not affect the system, except the newest "act relating to indemnity given to persons acquitted, when their case is taken up again," of May 20, 1898. Bills by which the appeal against all judgments ought to be introduced were always rejected.

I. The rules of the code have to be applied in all criminal cases, except—

(1) All military cases which are tried before military courts. The procedure in these cases will be regulated by a law accepted by the legislature in 1898, but not yet published, the rules of which are shaped in most points according to those of the common law, though in some important points on a more conservative basis;

(2) The cases in consular and colonial courts;

(3) All cases expressly reserved by the law to the legislature of the States.

(4) All prosecutions against reigning, governing princes and their families;

(5) All prosecutions against the "ex-territorials;"

(6) Some points especially regulated by other laws, such as concern posts or customs.

(Introductory laws to C. Const. Courts and C. Cr. Pr. and Code Const. Courts, secs. 18–21.)

But no act provides a special procedure for one special offense.

The rules of the code are applied everywhere in the territories of the German Empire, and exclude all foreign law regarding the procedure, and they were applied in all cases immediately after October 1, 1879; only when a judgment had been passed in a case before said date the rules for the appeal and all further procedure were those of the former law. (Secs. 8 to 10, introductory law.)

II. The number of books written on criminal procedure is not small. I mention only a few of them:

K. I. A. Mittermaier, *Das Deutsche Strafverfahren*, 1845; H. A. Zachariä, *Handbuch des Deutschen Strafprozesses*, 1860–1868; Planck, *Systematische Darstellung des Deutschen Strafverfahrens*, 1857, treat the former system of procedure and the beginning of the reformation.

The new system of our code is to be found in the handbooks of Holtzendorff (1877–1879) and Glaser (1885) and in the more concise works of Kries (1892), Ullmann (1893), Bennecke (1895), and Birkmeyer (1898). They all wrote a "*Lehrbuch des Deutschen Strafprozesses*." The best commentaries on the code are those of E. Löwe and Hellweg (9 ed., 1898) and of M. Stenglein (3 ed., 1898).

III. As it seems better in this article not to follow closely the system of the code, I shall give its outlines: First, the act relating to the constitution of the courts, and, second, the Code of Criminal Procedure.

(a) The former treats the following points:

(1) The position of the judges; (2) limits of jurisdiction; (3) the institution and jurisdiction of the county courts; (4) of the "courts with *schöffen*"; (5) of the district courts; (6) courts with jury; (7) commercial courts; (8) the higher district courts; (9) the imperial court; (10) the institution of public prosecution; (11) the secretaries; (12) officers for delivering and executing; (13) the assistance rendered by one court to another; (14) publicity and police in the court sessions; (15) language to be used in procedure; (16) deliberation and voting in the courts; (17) legal holidays.

But all this is very fragmentary and has to be carried out by the legislature of the individual States.

(b) The Code of Criminal Procedure is divided into seven books:

(1) The first book has general provisions: (a) The limits of juris-

diction as to cases, (b) and the local limits of jurisdiction; (c) irregularity of members of the court; (d) judicial sentences; (e) terms, and restitution for missing a term; (f) witnesses; (g) experts; (h) sequestration; (i) arrest; (k) mode of interrogating the accused person; (l) defense.

(2) The second book describes the procedure in the first instance: (a) The public action; (b) its preparation; (c) preparatory inquisition of the court; (d and e) preparation of the trial; (f) trial; (g) trial by jury; (h) trial against absentees.

(3) In the third book the legal remedies are enumerated: Complaint, appeal, revision.

(4) The fourth book provides how a case legally ended can be taken up again.

(5) The fifth how the injured person partakes in the prosecution.

(6) The sixth some special methods of transactions.

(7) The seventh as to executions and costs.

### C.

Following is the system as it is adopted in the German theory. We treat first of the persons partaking in the legal action—the court and the two parties.

I. The rules for the legal composition of the courts are found in the two above-mentioned laws.

Some principles concerning the constitution of the courts are stated by the laws:

(a) That all the courts derive their powers from the State only and not from a private person or corporation, as was the case formerly, on account of old privileges. Those patrimonial courts or the interfering of a private person in the judicial system did not go with our idea of government and justice; in consequence thereof our law declares that no one may be judged by another court other than that which is instituted by law to do so, especially that justice may not be rendered by the Government itself or by the princes. Courts for special cases are admitted only where established by law, such as army courts, courts in war time (courts-martial). (Law Const. of the Courts, secs. 12-16.) It is in consequence of this principle that a judgment, to be valid, never needs an approval of the Government. (Code of Criminal Procedure, sec. 485.) Naturally the pardoning power of the prince does not interfere with this principle, but it is a point of controversy whether the power of abolishing a case before judgment, as it exists still in some States, is not antagonistic to this principle.

The German courts are, with the exception of the imperial court in Leipzig, established by the States, and they administer justice as organs of the different States, but they derive their power directly from the imperial laws.

(b) The judges are independent, which means that they have not to follow any advice or any command in administering the law other than the decisions of the higher courts rendered in the legal course of a case. And if there exists a controversy whether a case belongs to justice or the administration, only the courts or a specially established "court of cognizance" can decide the question. (Code Const. of the Courts, secs. 1-17.)

(c) A third principle stated by our theory and adopted by our law, though not expressed directly, is that for all criminal cases there ought to be established more than one instance.

II. Of the German courts some have civil and criminal jurisdiction,

some criminal jurisdiction alone; their order is prescribed by the law relating to the constitution of the law courts. (Sects. 22-141.)

(1) In the "county courts" one single learned judge administers justice in civil and criminal cases; in the latter cases he only prepares the trial and presides at it, and in a few cases he may find the sentence himself alone.

(2) But the real lower criminal courts are the "Schöfengerichte" (courts with "schöffen," an old German word, "law-makers," Scabini), i. e., courts periodically meeting at the county courts for the purpose of trial. Their judges are the judge of the county court as president and two schöffen, nonprofessional men, chosen by lot, who deliberate and give their votes, together with the president. They have cognizance of all minor offenses, but the district court may confide to them the trial of some larger ones.

(3) The district courts are appellate courts, with "chambers" established annually in advance. These consist of a director and two judges; in criminal trials, of five judges, including the director. They are the courts of appeal in all cases judged by the schöffen court, and the courts of first instance for most offenses, called "Vergehen," and some "Verbrechen." At every district court a "judge for preparatory inquisition" is appointed annually in advance. He works as a single judge.

(4) The second court with nonprofessional judges is the "Schwurgericht" (court with a jury), meeting at the district court periodically, but at least four times a year, and consisting of a president, appointed each time by the higher district court, two learned judges, and twelve jurors. This is the court of first instance for all crimes not to be tried by the district court or the imperial court, and in some States also for all crimes committed through the press.

(5) The higher district court is an associated one, where "senates," with a president and four learned judges, are established annually in advance; they preside only over complaints and revisions in some minor cases.

(6) The imperial court, the only one established by the Empire itself, in the city of Leipzig, is the highest instance. Its senates consist of seven judges and decide all cases of revision against the sentences of the district courts and the courts with jury as courts of error. There is also the "Reichsgericht," the court of first and last instance in all cases of high treason against the Empire and Emperor, when the second and third senates together pass the sentence. In order to secure the unit of law no senate can overrule a decision of another senate except after a resolution taken by the two senates or the whole court in common. (Code Const. of the Courts, sec. 137.)

In the order of these courts no strict system is observed regarding the constitution, and especially the participation of laymen—a fault strongly criticised.

III. The rules for the local limits of the jurisdiction of the courts, their "forum," are found in the Code of Criminal Procedure, sections 7 to 21. These limits do not necessarily coincide with the boundaries of the single States.

As "fora communia ordinaria" the code states the district where the offense has been committed is that of the domicile or the residence of the offender at the time, when the charge goes into the court. There is no distinction between these fora. If a crime is committed outside the Empire, or when none of these former districts can be ascertained, the court is competent in whose district the prosecuted

person has been arrested. If there is more than one court competent, judgment has to be passed by that which first "opened the inquisition." In case of disputed competence the court is appointed by that court which is the next higher one than all those engaged in the question. If there is any hindrance that one court, though competent, does not pass sentence, the next higher one appoints another one instead.

IV. When different cases are connected, such as one person committing more than one offense, or that different persons are participating in the same offense, each court, to the district of which one of the cases belongs, is competent in all cases, provided they do not pass the limits of its material jurisdiction. (C. Cr. Pr., secs. 2-5, 13.)

V. A command or a judgment of any German court can be executed in all parts of the Empire, but a judicial act, such as arresting, i. e., or taking evidence, can be performed only in the district of original jurisdiction, except when the delay would incur danger. Therefore it is the legal duty of the county courts to render legal assistance in their district to any German court on demand in an ordinary lawsuit. (C. const. courts, secs. 157-169.) (Other cases of legal assistance are regulated by other laws.)

But legal assistance in regard to foreign countries is, up to this time, regulated only by treaties.

#### VI. Of the judges:

1. Those making a profession of their position have to undergo two state examinations after at least six years' study. They get their position from the States or the Empire, and receive a fixed salary. (C. const. courts, secs. 1 to 11.) At the imperial court the minimum age is fixed at thirty-five years. (Ibid., sec. 127.) All judges are appointed for lifetime and may be removed from office only from legal reasons by way of judgment. For the higher district courts it is stated by the law that the position of auxiliary judges can be held only by legally appointed judges. (Ibid., sec. 122.) And auxiliary judges are not admitted at all in the imperial court. (Ibid., sec. 134.)

2. The nonprofessional judges are obtained by lot out of all German men of thirty years or more not being public paupers or condemned for certain offenses; but there is no minimum census fixed. Certain classes may decline to accept the office. These judges do not receive any remuneration. (Ibid., secs. 31-57, 84-97.)

In order to get the needed number of lay judges the communities annually prepare lists containing the names of all those legally capable for the office, out of which a committee at the county court chooses the number of "schöffen" and jurors needed for the next year. For the "schöffen" the sessions are drawn by lot for the year in advance. For the courts with jury, thirty men are drawn by lot; out of this number for every case twelve men are selected in the trial again by lot, so that twelve jurors are obtained at last. The public prosecutor and the defendant have the right to challenge "peremptorily" a certain number. No challenge "for cause," however, is allowed here. (C. Cr. Pr., secs. 278-288.)

3. I mention the fact that the courts with "schöffen" have a good reputation in Germany, for though the "schöffen" are not very independent of the professional judge they can control him. Therefore, as the jury does not find universal approval, many lawyers demand the establishing of "schöffen" courts with a certain number of professional and lay judges in all instances.

4. There arises the question whether a judge ought to be excluded

from finding the sentence on account of his personal relations. The law states on this point (C. Cr. Pr., secs. 22-32):

(a) No judge can take part in a case who is injured by the offense himself, or has certain relations with the defendant or the injured person, or who has formerly acted in an official capacity in the case, or who was a witness.

(b) Besides, every professional judge and every *schöffe* (not the juror) may be challenged—"refused"—by the two parties at the beginning of the trial if there is reason for not trusting the impartiality of the judge. This has to be proved and decided by the court. If these rules are not observed the sentence is invalid. (C. Cr. Pr., sec. 377.) But they do not concern the position of the public prosecutor.

5. In each court there must be a secretary. (C. const. courts, sec. 154.)

6. In the court the president conducts the transactions and provides for the police, and the court can punish any disorder immediately. (C. const. c., secs. 170-185.) But the idea of "contempt of court" is unknown in Germany, as other provisions are made in its place.

7. Summonses are issued by the court but executed generally by the public prosecutor (C. Cr. Pr., secs. 36-41). This is a totally unnecessary French institution.

8. A verbal process has to be drawn up by the secretary in certain forms for all the transactions of the court. (C. Cr. Pr., secs. 186, 271-275.)

#### D.

I. (a) The office of the public prosecution, the "state's advocacy," (C. const. c., secs. 142-153) descends from the old French institution of the "ministère public." For whilst in France this magistrate is a "protector of the laws," and therefore has to control the judges, in Germany he is on an equality with the court, but restricted to prosecuting offenses before the court and legally independent of the court, and vice versa, not allowed to control the court.

(b) The states advocacy depends upon the government: (1) derives its powers from the government; (2) relies upon the government; (3) is appointed by the government; (4) is accountable only to the government and its commands—a provision frequently denounced as being dangerous to the administration of the law. With each court such an office is connected, and all form together a hierarchical unit in every state, so that the higher official can command the official of a lower court. The police does not belong to this organism, but is at its disposal. The public prosecutor has to pass through the same examinations as the judge and follows the same career.

(c) The German code stipulates that a public action may be brought before the court by the state prosecutor only, who has a "monopoly for accusations"—undoubtedly a fault. But in order that all offenses may be really prosecuted, the code stipulates that it is the legal duty of the state prosecutor to present to the court all those offenses he hears of, and can sufficiently prove, and in which there is no legal bar. This is exaggerated and compels prosecution of even the pettiest offenses, but as long as the state has the monopoly for accusations we can not avoid it and adopt in its place the system of prosecuting offenses only when it seems reasonable. However, its arbitrariness can be avoided, and this is done best by the subsidiary action of a private person, so that any injured private person can prosecute in case the state prosecutor fails to do it. Our law does not know

this provision, but has another, which is that any person injured in any way by an offense, bringing an information to the state's attorney, can bring in a complaint at the higher district court when the state's attorney refuses to prosecute. The order of this court has to be obeyed by the prosecutor, who now becomes dependent upon the court, which becomes the real prosecutor. But this institution does not protect sufficiently.

Finally, the law demands that the state's attorney in his work shall attend not only to the prosecution, but even to the defense. He has to work "objectively" on both sides, a difficult task. Another great fault is a ruling of the code that the public prosecutor may use the legal remedies even in favor of the condemned.<sup>1</sup>

(d) The different aspects of the mission of the public prosecutor are (C., sec. 156 ff.):

To search for offenses and receive information;

To clear up the case in a preliminary investigation. Here the county judge has to render his assistance, when a coercion is needed, the public prosecutor having no right of compulsion; only when a delay incurs danger the public prosecutor has coercive power under the control of the courts;

To bring in the legal actions, which he can neither withhold nor withdraw, so that he is now under the control of the court. And on the action the court has to decide whether the chief trial shall be opened (C., secs. 151-155);

To produce evidence and partake in the transactions and plead;

To bring in legal remedies; and

To execute the judgment. (C., sec. 483.)

(2) The injured person serves only as witness according to the German law. But as he is oftentimes interested in the condemnation of the offender to a greater extent, he has a twofold right of participation besides the above-mentioned complaint. (C., secs. 414-446.)

(a) In case of insult, simple bodily injury, and unfair competition, any one who has the right of complaint can, when he is of age, bring in the action independently, without applying to the state's advocate ("private action"), and then he has all the rights of the public prosecutor as a party. He can even withdraw his action. He can not serve as witness. The public prosecutor has the right of participation in any way when this seems necessary.

(b) Any one who can be a private actor, or on whose demand the court decided that a public action has to be brought in, or who may demand a material satisfaction from the offender, can intervene in the public action, and has then all the rights of a private actor; but he can be a witness.

(3) Finally, besides the state's advocate some state authorities have an independent right of prosecution; the police can get by the state legislature the right of punishing police contraventions with arrest for a fortnight, or a fine up to 150 marks, against which sentence the punished person can bring in either a complaint at the superior police or an appeal at the county court, where the state's advocate now conducts the case as on a public action. (C., secs. 453-458.)

And a similar right is granted to the boards of finances. But they can even bring in a public action independently, if the state's advocate does not do that on their demand. (C., secs. 459-469.)

II. Only an individual can be the subject of prosecution (never a

<sup>1</sup> The judge-advocate in courts-martial has this anomalous position.

corporation). And the prosecuted person has his own rights, which are to be regarded by the court. But these are very insignificant in some points, especially before the chief trial begins; so that the so-called "equality of parties" exists only to a certain degree. On the other hand, the defendant has some special rights as being weaker than the public prosecutor; so, i. e., a condemnation needs a higher majority of votes (C., sec. 262) or the judgment can not be altered to his disadvantage when he brought in the legal remedy. The accused is free from coercion; he may keep silent; but the code does not furnish the guarantees of this liberty given by the English-American law. Naturally, he may be arrested. The law does not admit that his transactions should hinder the judge from searching for the historical truth.

That the defendant may use his rights he must be informed of the charge at his first examination, later on of the form of the legal action, and he gets knowledge of all the transactions. (C., secs. 136, 190, 199, 214, 246.)

Only during the preparatory inquisition this principle is not carried out, a fault now amended by the French act of December 8, 1897.

His other rights are mainly that of being present at the chief trial, as no sentence can be passed against an absent person, and only few exceptions are allowed by the code. Anyone can get leave of absence in petty cases when he has been heard by a judge. (C., secs. 229-235.) Then, when only a pecuniary condemnation is possible, an absent person can be sentenced whose sojourn is unknown or who stays in a foreign country and can not be brought before the court from thence, but he may appear through a substitute. (C., secs. 318-337.) And, finally, men being in military duty can be sentenced though being absent on account of emigrating without leave. (C., secs. 470-476.) In private actions the defendant can appear by substitute. (C., sec. 427.) In all other cases he can be compelled by way of arrest to be present. (Sec. 229.)

He can concur in all transactions, produce evidence, plead, and bring in all legal remedies. Therefore he must be sound enough in mind to do all this.

In the chief trial the prosecuted has to be instructed of any change in the legal consideration of the case, and especially when the punishment might be higher than was announced in the action. He may then demand that the trial be adjourned to prepare his defense. (Sec. 264.)

(4) But a special right of the accused person is that he may have counsel, which the code admits in all cases and during the whole procedure. (C., secs 137-150.)

In some cases (trial before the imperial court or a jury; before a district court under special conditions) the formal defense is even called necessary, and here and in other cases, on demand of the accused, the court appoints a defender, or he may have privilege of choosing one or several freely. The defenders are admitted German lawyers, university teachers of law; other persons only with the approval of the court. It is a fault that the code does not provide for the public defense of minors, and that the court does not appoint as yet the defender during the preparatory inquisition.

The counsel for the defense, though dependent upon the will of the defendant as his agent, may also act independently. He has always free intercourse with his client, and only during the preparatory

inquisition may the judge demand that he control the intercourse. He may read the reports and acts. He has to be summoned to the trial. (Sec. 217.) Any restriction of the defense on an important point makes the sentence invalid. (Sec. 377.)

(5) Besides, certain relations of the prosecuted act for him or in his assistance. (Sec. 349.)

## E.

In the rules of the procedure the code has adopted some principles, though it does not state them expressly. These are:

(1) That of "historical, material truth." Only the offense as it has been really committed can be the subject of the judgment. The parties can not dispose of the facts, can not enter into an agreement, nor simply plead guilty without further evidence. There are no prejudices or fictions or presumptions; i. e., of the sound mind of the accused. Therefore the code makes the judge act quite regardless of the transactions of the parties. The public action can not be withdrawn. The judge does not wait for special motions during the trial, but inquires independently.

(2) The principle that the court can judge only of the facts brought before it by the parties—the judgment has to correspond to the action exactly. This can be extended to other offenses only with the approval of the accused and never to a crime proper. But the judgment can not omit any part of the action. Neither can the court begin its inquisition without an action, but this does not prevent the court from a free inquiry within the limits of the action. It is independent of the parties' opinions in its judgment concerning the law. (Sec. 153.) This liberty of the court is carried too far by the code, especially in the preparatory inquisition and in conducting the chief trial, and the accused is too little regarded.

(3) Publicity is expressly provided for the chief trials in all instances, so that every grown-up person can be admitted. (Sects. 170–176, C. Const. and Courts.) This does not relate to the preparatory inquisition, and there are exceptions stated in case the transactions might endanger public order or public morality. The sentence, however, is always pronounced publicly.

(4) Oral procedure, which means that all the proceedings before the court pronouncing sentence have to be oral ones. Only what is brought before the court orally has validity as evidence and pleadings; and documents must be read aloud. That makes the procedure very simple, but it has to be registered minutely, so that the judges do not forget the material. A trial can not be interrupted for longer than three days. (C., sec. 228.) With this principle is combined the other one, that all evidence has to be produced in its original form, which I shall mention further on. In the higher instances the reports of the first instance may be used, and not all the evidence has to be produced a second time. (C., secs. 365, 366, 391.)

(5) The principle that one sentence can only be given for one crime; when a sentence has been pronounced by a German criminal court in a case against a person, the same case can not be tried again before a criminal court against the same person—"ne bis in idem." The judgment becomes "valid in law" and can not be changed. This principle, though not stated by the code expressly, is the basis of all its regulations.

## F.

Before examining the following we must know some of the general provisions concerning the means of coercion, which are twofold: Either to get hold of the person of the accused or of the evidence.

(1) The principal method of the German law of compelling the prosecuted to appear before the court is by way of arrest—"inquisitorial arrest." Though the defendant never has a right to give security personally, yet this is possible, but it is only a subsidiary method in the discretion of the court; the security consists either in money or bail. (Secs. 117-122.)

No arrest can be executed without a written formal warrant of the judge, either by a competent court or the county judge in whose district the prosecuted is apprehended. The warrant extends all over the Empire. No arrest is allowed except in certain cases:

(a) After an action is brought in, the court may order an arrest when it is probable from the facts already known that a condemnation will take place and when there is sufficient reason for supposing that the defendant may either escape or tamper with evidence. It is assumed without further evidence that he will not appear in case of crime proper, or when he is a tramp or an unknown person without means of identification, or if he is a foreigner, who probably would not appear otherwise. In case of police contraventions only the two latter classes may be arrested and only for the sake of not escaping.

(b) Before an action is brought in, an arrest may be ordered by the county judge on demand of the state's advocate upon the same grounds, but then the action must be brought in in a fortnight at the latest, or in four weeks in case of "Verbrechen" and "Vergehen" (crimes and misdemeanors).

Provisional arrest may be executed by the police always when there is reason for a formal arrest; by other persons only when an offense is committed in their presence—"flagrante delicto." (Yet they never are bound by law to do so.) But the person so arrested has to be heard by the judge of the county the following day at the latest, and this judge may either issue a warrant of arrest or deny it. Every arrested person must be heard by a competent judge about the subject of the prosecution the day after the arrest at the latest. The inquisitorial arrest may count as punishment, according to the discretion of the court. (C., secs. 112-132.)

The court may order the sequestration of the whole fortune of an absent person whose sojourn is unknown or who stays in a foreign country, if there are reasons to issue a warrant of arrest, and it may grant safe conduct to an absent defendant. (C., secs. 332-337.)

(2) Means of evidence of any kind and in anyone's possession may be seized by the judge—by the state's advocate or by the police only when delay incurs danger, and then the judge has to ratify the act within three days at the latest. In case of refusing to deliver the evidence, arrest not exceeding six months, in case of police contraventions not exceeding six weeks, and punishment besides may be applied. In the same way any postal matter addressed to the prosecuted or coming from him may be seized at the post-office, but only the judge can open the letters and telegrams.

This arrest is allowed only when a person is already charged with a distinct offense.

In order to find distinct things which are of importance as evidence or the accused himself, the judge—the state's advocate and the

police only when delay incurs danger—may search the residence or anything of the accused and his supposed complices at all times; but of other persons only when there are special reasons for believing that the thing or the person will be found. In nighttime this right is given only under special conditions. The person concerned can not always be present, and during his absence another resident of the house or a neighbor has to be asked to assist, and certain formalities have always to be observed. Only the judge may look through the writings found in such a manner against the owner's consent. (C., secs. 94–111.)

## G.

Evidence is the center of the procedure, and here the reform movement of the nineteenth century produced great changes, abolishing especially the laws which allowed only certain kinds of evidence or prescribed its quantity and quality. The German law, however, does not resemble the English law of evidence.

The principles of the German law of evidence are as follows:

(1) The judge examines all the proofs according to the laws of logic and experience, following his free personal conviction. (Secs. 260, 261.) There are no presumptions (except some in the press law), and no special ones of innocence. Any guilt, however, must be proved really and clearly. Mental soundness is never presumed, but if reasonably doubted must be proved by the court. The question of insanity is treated in the same way as anything else relating to the criminal act. It belongs to the question of guilt. A man is not guilty in law if he is insane. Therefore he is acquitted, i. e., by the verdict of the jury, or the trial may not be opened at all. But when the accused is insane in time of the procedure only and not able to understand the proceedings, no proceeding can take place, and if begun, must be closed without judgment.

(2) Any means of proof may be produced, children and insane people may be witnesses, but special forms are prescribed for producing the proofs.

(3) All evidence must be really produced before the judge and the parties, and discussed by them, in order to be considered as valid; but then none can be omitted by the judge in the sentence.

(4) All proofs have to be produced in the original (secs. 248–255), not by means of substitute, nor, i. e., in the reports of the preparatory inquisition. Witnesses and experts must appear themselves and can not send written documents, nor can a third person be examined in their place. That does not exclude "hearsay evidence," as long as this is not meant to take the place of the declaration underlying the hearsay. Minutes of the witnesses' statements may be read in the court only when they are taken by a judge and when the witnesses are dead or their sojourn is unknown. In case of experts some exceptions are made. Documents must be produced originally. An inspection has to be taken by the court itself, but as this is very difficult or impossible sometimes, a judicial report may take its place.

(5) Every participant in the process may cooperate in the evidence, especially the judge acting independently. The parties may bring in motions for proofs, which are then principally procured by the court, but the parties may furnish proofs and summon witnesses themselves. (C., secs. 218–221.)

All proofs brought before the court formally in the trial must be

produced, a principal right of the parties frequently attacked. This right is not granted for the trial before the court with *schöffen* only and in one case of appeal. (C., secs. 243, 244.)

(6) Following the principle of material truth, no burden of proof exists, according to which the court may not cooperate in producing evidence, but is restricted to evidence produced by the parties, and each party has to produce all the evidence necessary to sustain their own case. This principle of the civil procedure can not be that of the criminal procedure, and no term for producing the proofs is known. (Sec. 245.) But it is only natural that every party should care for the furnishing of the proofs in his favor.

(7) Proofs are produced in the preparatory inquisition, provisionally, summarily, definitively, and formally, only when they probably might get lost. In the chief trial the president produces the proofs (secs. 237-241), but all the judges (and jurors) and the parties may ask questions. Examination and cross-examination by the parties, though allowed by the code (sec. 238), is practically unknown. At the German institution the judge comes to the trial having some knowledge of the case already, by which he might get prejudiced to a certain degree, especially if he has studied the reports of the preparatory inquisition in advance.

(8) In case of absence of the prosecuted, the proof can be secured by recording. (Secs. 327-336.)

(9) Besides evidence, the code allows in some formal details a kind of probability, a "half-evidence," by making facts only credible. (Secs. 26, 45, 55, 74.)

II. The code enumerates some proofs and prescribes the order in which they may be produced—witnesses, experts, judicial inspection. In addition, we mention the prosecuted himself, documents, and circumstances.

(1) As witnesses (C., secs. 48-71) everyone can and must serve, and anyone not appearing before the court, having been properly summoned, can be punished and compelled to come. In the same way everyone is punished who refuses to give evidence in court, and in order to compel him to do so, imprisonment not exceeding six months may be given. However, persons being near relations of the prosecuted may refuse to testify; other persons are excused only when their testimony would criminate themselves.

Every witness must give evidence upon oath, to count as valid, with the exception of children up to 16 years and those suspected of partaking in the crime. The person accused may always give evidence. Naturally the state's advocate and the counsel for the defense never can be witnesses at the same time.

(2) To serve as experts (secs. 72-93), only certain classes of persons may be compelled, if necessary, by way of fine. Experts may be challenged like judges, and they may refuse to give evidence just like witnesses. They are bound by a special oath, not that of the witnesses, as they are not witnesses ordinarily speaking.

The code allows an accused person to be confined in a lunatic asylum up to six weeks on demand of an expert and with the approval of counsel, in order that his mental soundness may be examined.

(3) For a judicial inspection the code gives the form of the report. (Sec. 86.)

(4) The defendant can always speak freely and is asked to do so by the judge in the preparatory inquisition and in the chief trial, but never when acting as witness, a form quite unknown in the English

law. (C., secs. 136, 190, 242.) But he may keep silent just as well. All he says, and especially a confession, is examined by the court as part of the evidence; undoubtedly a practical method. In our theory it is stated that the defendant should not be induced to confess by means of leading questions, a demand not always observed very scrupulously in practice.

(5) Documents of any kind are admitted by the German law. They can not be read in the place of the statements of witnesses and experts, as mentioned above (p. 27).

## H.

Following the course of the procedure, we observe in the German law quite similar stages as in other laws. The chief trial requires preparing, which is done in two ways: First, the state inquires whether it will and can bring in an action, and then the court examines whether the action is sufficient for opening the trial.

These three stages are treated by the code, though the inquiry of the state certainly does not belong to the "procedure" proper. Whether the judicial preparatory inquisition be a part of the "procedure" proper is a point of theoretical controversy; at all events, according to the code the defendant has still very few rights here.

I. The state conducts a preliminary investigation (C., secs. 156-168), assisted by the police and the county judge—when judicial authority is needed—to determine whether it may bring in a criminal action. If it does not think that possible, it may suspend its investigation quite informally.

II. The criminal action of the state's advocate is of different kinds according to the code:

(a) Either it demands that the judge open the judicial preparatory inquisition in order to examine whether the action is sufficiently substantiated for a trial. (Sec. 177.) In this case the prosecution brings in a new motion after the preparatory inquisition. (Sec. 195.)

(b) Or the State's advocate asks that the trial may be opened immediately. This is called "accusation" by our law against the "public action," which is the general expression for both methods. (Sec. 168.)

(c) A summary way is the motion for a "punitive order," or "order of punishment," of the county judge in petty affairs. (Secs. 147-452.)

This action has to be brought in by letter, except where an oral action is possible. (Secs. 211, 265.)

The public action is the chief basis of the procedure, prescribing its limits; therefore it must have a precise and sufficient certainty and must describe accurately the accused and the offense or offenses he is charged with as historical fact (sec. 177). The court can not go beyond these limits (sec. 153). The "accusation" must first allege the law after which the fact may be punished (sec. 198).

After the action is brought in, and the court has opened the preparatory inquisition or the examination of the "accusation," it can not be withdrawn (sec. 154)—"la cour est saisie," as the French term is.

The "accusation," after the preparatory inquisition, and the judgment have to correspond exactly with the public action in its actual contents, though accidentals, as name, date, place, may be amended (secs. 198, 263). But in the judgment of law the sentence is independent of the opinion given in the action.

III. The judicial preparatory inquisition (secs. 176-195), a German-Austrian specialty, has for its object (sec. 188) to examine

whether on the action the prosecuted is *prima facie* guilty, so that the trial may be opened, and, moreover, to give an opportunity for the defense of the prosecuted and to prepare the evidence so it may be brought into the trial without difficulty. It is of advantage that this procedure should be conducted by an impartial judge, one who is not dependent upon the state's advocate, as in France; but it has this disadvantage, that the parties do not come together much here and it is held with closed doors. While, according to the law, it has only to prepare, in practice it does so so minutely that the case is mostly entirely clear even in details after the preparatory inquisition—a great fault, as in this stage the principles of the procedure are not yet observed.

The preparatory inquisition is by law absolutely necessary in all cases belonging to the jurisdiction of the courts with jury, and the imperial court also in the cases within the jurisdiction of the district courts if the state's advocate demands it, or if the defendant demands it and gives sufficient reasons that it may be opened (sec. 176). It is not allowed at all in the cases belonging to the courts with *schöffen*; in all other cases it is allowed, but not obligatory.

During the preparatory inquisition the defendant has to be heard, the prosecutor and the counsel not being present (sec. 190). He may bring in motions; but the proceedings are not communicated to him; the evidence is not produced in his presence. The whole procedure has to be taken down in writing (sec. 186).

IV. After the preparatory inquisition is over the prosecution brings in its motion (sec. 196), by which the court, however, is not bound in its decision (sec. 204). The prosecution may either demand a "*nolle prosequi*" or prefer an "*accusation*." In the former case the court may approve or determine that an accusation has to be brought in, which now has to be done by the state's advocate (sec. 206).

Any bill of accusation has to be communicated to the accused (sec. 199), who now may raise all objections he deems fit to bar the opening of the trial. Counsel for the defense is appointed by the court, if necessary. And the court has to form a resolution, to wit:

(a) Either a "*nolle prosequi*" (secs. 202, 203), if the suspicion is not a sufficient one, or if it appears that the case has been tried before, or that no law could be applied to the fact. If in this case the prosecution thinks fit to prefer a new action it must find it on new facts or on new proofs (sec. 210). The prosecution has a right to complain against this resolution.

(b) Or to complete the preparatory inquisition or to open one. (Sec. 200.)

(c) Or to propose the "*nolle prosequi ad interim*" if the defendant is absent or insane. (Sec. 203.)

(d) Or to open the trial by a formal resolution corresponding to the accusation and forming the basis for the trial, the accusation alone not being sufficient. (Secs. 205-208.)

Of the three judges taking part in this resolution only two can be members of the court of trial. The judge of the preparatory inquisition is barred from participating.

V. After the resolution the trial has to be prepared. The interval between the date of the summons and that of the trial must not be less than a week. (Secs. 212-224.)

VI. At the trial the state's advocate and the judges partaking in the sentence must be present during the whole time (sec. 225). It is conducted by the president, who also produces the evidence (sec. 237).

After the resolution opening the trial is read (not the letter of accusation), all the witnesses being absent (there is nothing like the English "opening the case" known in the German law), the defendant is heard and the evidence produced (sec. 242). When the parties have pleaded and the accused spoken personally at the end (sec. 257) the trial ends—

(a) Either materially with a "sentence." If the fact is not proven, or the fact proven but not punishable, the sentence is "acquittal;" if the fact is proven and punishable, "condemnation;" if the fact is proven but the legal punishment is prevented in this special case, the sentence declares the trial "suspended" (Sec. 259.)

(b) Formally by a "resolution." If the procedure ought not to take place formally—i. e., the court is not the competent one—or a resolution opening the case is not formed, or the accused person insane, or he was "autrefois acquit."

Every sentence must have an explanation besides the executing part, and the facts accepted as proven and the penal law administered must be enumerated; or it has to be declared whether the accused is acquitted, as the facts are not proven, or no penal law is to be administered. (Sec. 226.) In a condemnation at least two-thirds of the votes must concur in declaring the accused "guilty;" that means eight out of twelve jurors.

VII. Special rules are naturally given for the trial with jury, and that mainly for the questions asked—a point arranged quite differently from the English law. The jury decides the question of guilt, but not that of punishment, and it always applies the law.

After the evidence is closed a system of questions is drawn up with the concurrence of all the participants and the jury. This system contains all the details of the accusation and all the points brought forward during the trial, and is meant to help the jury in finding the verdict. It is very difficult to arrange it rightly. (Sec. 290.) The system is composed of:

(a) The principal question, "Is the defendant guilty of having committed the act minutely described according to the expressions of the law as the resolution opening the trial described it?" (Sec. 293.)

(b) "Secondary questions" have to be asked in the same form when conditions come forward during the trial out of which the act might be judged differently; i. e., manslaughter for murder, obtaining goods by false pretenses for theft. (Sec. 294.)

(c) Additional questions can be asked when there are conditions out of which the act may be punished by a higher or less sentence, such as mitigating circumstances (secs. 294, 297, 298) like homicide caused by provocation of the one killed.

The presiding judge informs the jury how to judge the act according to the law, how to interpret and understand the law; but he can not direct the jury as to the proofs; he can not sum up the case nor give a "résumé," as it was the law of the French code formerly. But this is very difficult to avoid, for, as the parties are expressly forbidden to criticise this information, the presiding judge can easily communicate his own opinion of the case to the jury. (Sec. 300.)

The jury is strictly guarded, and chooses its own foreman. (Secs. 301-304.) It answers the questions with "Yes" or "No," and even with reservation. The jurors can ask for further information or that the questions be altered; but they can not give a special verdict. (Sec. 306.) If the answer is not clear, not complete, or if it is contradictory in itself, it has to be amended. (Secs. 309-312.) Then the

court pronounces either the acquittal or the condemnation. (Secs. 313-316.)

Only in one case can the court cancel the verdict, and that is, if the judges are unanimously of the opinion that the jury committed an error to the disadvantage of the defendant, they can bring the case before the next jury, whose verdict never can be amended. (Sec. 317.)

VIII. Finally, the code provides for special modes of procedure against absentees (secs. 318-337)—in case of private actions or interventions of a private person to the public action (secs. 414-446—*vide above*, p. 20), and for the “punishing order” of the police and the county judge (secs. 447-469, *vide above*, p. 18). In petty affairs the county judge may punish by a simple written order on the motion of the state’s advocate (a kind of summary jurisdiction). If the defendant accepts the order, this becomes valid like a judgment; if he refuses to do so, the case comes before the court with *schöffen*.

IX. The code knows two kinds of legal remedies, those in the proper sense and the motion of taking up a case already decided by a sentence valid in law.

For both kinds the same general provisions are given (secs. 338-345, 405), especially:

That both parties may bring them in—never the court—the state’s advocate also in favor of the defendant; and also, when the state’s advocate preferred a legal remedy, the decision can be amended in favor of the defendant; whilst on the other hand, a decision attacked by the defendant, or in his favor, can never be altered to his disadvantage. They are to be always in writing, and can always be withdrawn; they may be confined to certain points of the decision.

A. The legal remedies proper are: Complaint, appeal, revision.

(1) The “complaint” is the legal remedy against all decisions of the court, excepted judgments, in order to criticise them in every direction and even whether they answer their purpose. (C, secs. 346-353.) There are excepted the decisions of the higher district court and the imperial court, the decisions given during the chief trial in order to help the forming of the judgment, and those specially mentioned. This remedy may be taken even by witnesses or other persons concerned. It does not delay the executing of the decision. A limit of time for bringing it in is given only in a few cases.

(2) The “appeal” is a motion for a new trial, where not only the former one is reexamined, but the whole case tried and decided again. (C, secs. 354-373.) This remedy is given against all the decisions of the *schöffen* court, they being considered as of summary procedure. It may be brought in during one week after the decision by letter at the county court, and can be dismissed for a defect in form here or in the district court. The new trial is carried on before the latter court almost exactly like the first one, and the new decision is passed by the court of appeal, or in some cases after a new trial in the court of the first instance.

(3) The “revision” is the remedy directed against all judgments of the district court and the court with jury, in order to have them examined as to whether they are founded on a wrong application of any law. (C, secs. 374-398.) The court of errors never touches the facts of the evidence directly, but indirectly, as the procedure of the evidence may be illegal. The code presumes some rules of the procedure as being absolutely essential, material ones. If they are not observed, the judgment is always invalid. In other cases it has to be decided in any special case whether the judgment is based on the error. Some

rules will always be unessential—as i. e., those of the preparatory inquisition or an error in registering.

The remedy is restricted on the side of the prosecutor in favor of the defendant. The procedure is nearly the same here as in case of an appeal. By the judgment of the court of errors the remedy is either denied or admitted, and then generally the court below has to decide again, and is bound by the opinion of the court of errors concerning the legal error; or, in some cases, the court of errors may pronounce judgment itself.

If the canceled decision concerns more than one defendant, only one of them having asked the revision, the decision is canceled in favor of all defendants.

B. A procedure closed by a judgment valid in law can be renewed only in case of need, yet not in such narrow limits as it is the case in France to-day. The German law has a remedy for this purpose: "Wiederaufnahme eines durch rechtskräftiges Urteil geschlossenen Verfahrens"—"the taking up of a case already decided by a sentence valid in law," allowed against every judgment valid in law, which does not answer the truth (C, secs. 399–413); the conditions which, one naturally supposes, have to be accurately stated in the motion for the remedy are enumerated by the code, and separately, whether the remedy should be given in favor of the condemned or to his disadvantage, in somewhat narrower limits in the second case than in the first one. Limits of time are not prescribed; not even the death of the condemned closes the remedy.

The motion goes to the court, which pronounced the judgment now attacked. First, it is decided whether the motion is to be admitted formally. In this case the remedy is examined materially, and either the motion is dismissed or the court orders the taking up of the procedure. Then a new trial takes place exactly like the former one on which the former judgment was based.

After long and manifold consideration in parliament, the legislature passed an act "relating to the indemnity given to the persons acquitted, when the case is taken up again," of May 20, 1898. According to this act persons acquitted or even punished if their case is taken up again after it was ended by a judgment valid in law, may ask an indemnity of the state, when the judgment has been executed totally or partly. But it must be specially stated in the new trial that the condemned is innocent or that there is no reason left for suspecting him, a quite unnecessary restriction. The indemnity can not be claimed if the condemned has caused his condemnation purposely or with gross carelessness.

Besides the condemned himself those dependent upon him have a title to the indemnity. This is given only for direct material loss caused by the executing of the former judgment. The procedure is one of many unnecessary formalities; the court grants only the right to the indemnity by a special resolution and then the indemnity has to be asked from the state's advocate within three months, and the government's decisions may be accepted or attacked by way of a lawsuit during a term of three months.

#### J.

In the seventh book the code regulates some points of the execution and the costs of the procedure.

(1) The execution is a part of the duty of the state's advocate. The

death penalty is executed, not publicly, but in the presence of witnesses. The punishment concerning liberty is suspended as long as the condemned is insane or otherwise severely ill, or when the execution might involve great damage to him or his family, if it is not the special object of the punishment to do this. (C, secs. 481-495.)

(2) Every decision has to provide for the costs of the procedure. Generally the condemned has to pay all these costs, except those caused by other persons; the acquitted never has to pay any costs, and may even get back his expenses. The costs of a remedy withdrawn or dismissed are to be paid by the party who asked for it.

The amount of the costs is regulated by the so-called "act concerning judicial costs" of June 18, 1878, amended by an act of June 29, 1881, in the new form of May 20, 1898. The fees for witnesses and experts are regulated by the act of June 30, 1878, amended by an act of June 11, 1890, in the new form of May 20, 1898.

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#### RECENT CHANGES IN THE GERMAN CRIMINAL CODE.

By HERMANN ADAMI, LL.D.

In the year 1900 several articles of the German criminal code were altered as follows: Sections 180, 181, 184, and 362 were repealed, and sections 181a, 184a, and 184b were adopted. The text of the past and of the present law are given below.

Sec. 180. Whoever habitually or for gain assists, permits, or furnishes opportunity for lewdness shall be punished for pandering with imprisonment for not less than one month; he may also be fined from one hundred and fifty to six thousand marks, with loss of the rights of citizenship, and be put under police surveillance. If there are mitigating circumstances, the imprisonment may be diminished to one day.

Sec. 181. Pandering, even if not carried on habitually or as a means of profit, is punishable by five years imprisonment in house of correction (*zuchthaus*)—

1. If deceitful practices are employed to procure opportunity for lewdness; or

2. If the accused person stands to the pandered person in the relation of husband to wife, parent to child, guardian to ward, clergyman, teacher, or educator to those to be educated and trained.

Besides punishment by imprisonment there shall be loss of the rights of citizenship, and there may also be a fine of from one hundred and fifty to six thousand marks and surveillance by the police.

In case of mitigating circumstances, there may be a fine of not over three thousand marks, besides imprisonment.

Sec. 181a. Any male person who carries on a lewd business with any female, or derives his livelihood in whole or in part from her immoral life, or who habitually or for gain protects her in her immoral business, or in any wise panders or is a promoter of such business, shall be punished with imprisonment for not less than one month.

If the panderer is the husband of the female, or if the panderer compels the female to carry on her lewd occupation through force or by threats, he shall suffer imprisonment not less than one year.

Besides imprisonment there may also be loss of the rights of citizenship, police surveillance, and also conviction by the local judicial

tribunal with the consequences prescribed in sections 3 and 4 of section 362 of the German penal code.

Sec. 184. With imprisonment for a year and fine up to a thousand marks, or with one of these punishments, any person shall be punished who—

1. Offers for sale, sells, distributes, exposes, or affixes in public places, or otherwise causes to be known lewd writings, pictures, or representations; or who keeps such things in store for this purpose, or who advertises or recommends them.

2. Gives, for compensation, lewd writings, pictures, or representations to any person under the age of sixteen;

3. Offers objects intended for lewd use in public places or who advertises or recommends such objects to the public;

4. Makes in public announcements which may induce lewdness.

Besides imprisonment there may be loss of the rights of citizenship and police surveillance.

Sec. 184a. Whoever shall offer for compensation or sell writings, pictures, or representations which without being lewd shall injure grossly the modesty of any person under sixteen years of age shall be punished by imprisonment up to six months or by a fine up to six hundred marks.

Sec. 184b. He shall be punished by a fine up to three hundred marks or by imprisonment up to six months, who communicates court proceedings to which the public are not admitted on account of danger to morality; or who shall make public matters from the official records which may lead to scandal.

Sec. 362. Convicts who have been sentenced according to the prescriptions of section 361, paragraphs 3 to 8, may be put to work, according to their abilities, within the place of imprisonment, or outside if they are kept separate from other free laborers.

In condemning to imprisonment it may be announced to the condemned person that on the completion of his sentence he is to be turned over to the surveillance of the Government police. But this is only permissible (sec. 361, par. 4) when the convict within the last three years has been legally found guilty of a misdemeanor several times, or if he has begged with threats or with weapons.

If turned over to the Government police, the police have the authority to put the convict into the workhouse up to two years or to employ him in public works for that time. By section 361, paragraph 6, the police may put the convict into a reformatory or an asylum, instead of into a workhouse. It is not allowable to put a prisoner into a workhouse if he has not passed his eighteenth year.

If a foreigner is put under the care of the Government police, instead of being put into an institution, he may be banished from the German Confederation.



## BELGIAN PENAL CODE.<sup>1</sup>

By Professor ADOLPH PRINS.

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### 1. HISTORICAL SURVEY.

Belgium, after having existed under the dominion of the Salic law, was, during the Middle Ages, governed by local criminal legislation, the Keures or communal charters. From the time of Charles V and until the tenth century, criminal proceedings were regulated by edicts or ordinances—that is to say, by acts of sovereigns, which were enforced throughout the entire country, after they had been separately published in each province. After Charles V and Philip II, Maria Theresa and Joseph II endeavored to remodel portions of the penal practice. But in Belgium, as in the remainder Europe, it was found impossible to codify the penal laws of the ancient governments. Penal procedure alone had been made the subject of codification. Penal laws preserved their national character until the French Revolution, when they were submerged in laws of foreign origin. The Belgian States, occupied by the French forces about the end of 1792, were united to France by a decree of Vendémaire 9, year IV (October 1, 1795), and all the French laws passed since 1789 took immediate force, especially the Penal Code of 1791, an enactment of the constituent assembly.

The lot of the country was, until 1815, joined to that of France, and Belgium received the Napoleonic laws, and like all the nations from Rome to Hamburg which belonged to the French Empire, was amenable to the celebrated Penal Code of 1810.

At the disruption of the Empire, Belgium was united to Holland, and formed the Kingdom of the Netherlands. The Government moderated punishments and abolished general confiscation of property, without changing the essential characteristics of the code of 1810.

In 1830, Belgium having gained her independence, the national congress declared legislation necessary. The constitution of 1831 prescribed a revision of laws, abrogating at once the deprivation of citizenship and sustaining the enactment against general confiscation of property.

The work of preparing the Penal Code commenced in 1834, when a preliminary project of revision was prepared by a special commission. In 1848 there was appointed by royal decree a commission charged with the preparation of the revision. This commission, of

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<sup>1</sup>J. J. Haus, General Principles of Belgian Penal Law, 2 vols., 3d edition, Ghent, 1874. Patria Belgica, National Encyclopedia, by Van Bemmel, Vol. II, p. 619. Nypels, Penal Law, 3 vols., Brussels, Bruylant Christophe, 1873. Nypels, Belgian Penal Code interpreted, 3 vols., Brussels, Bruylant Christophe, 1867. Nypels, Criminal Legislation of Belgium, or Commentary on and Complement of the Belgian Penal Code, 4 vols., Brussels, Bruylant Christophe, 1872. Thiry, Course of Criminal Law, 1 vol., Liege, Desoer, 1892. Prins, Crime and Repression, 1 vol., Brussels, Muquardt, 1886.

which Messrs. Haus and Nypels were members, presented to the legislative chambers the first part of the work. After eighteen years of study and discussion the Penal Code of October 15, 1867, now in force, was completed. At this date Belgium had been controlled by the Penal Code of France for fifty-six years.

## 2. BELGIAN PENAL CODE OF 1867.

The theory of the Penal Code of 1867, and the principle which inspired its authors were opposed to those which characterized the code of 1810. The authors of the Imperial Code belonged to that school which, under the influence of Bentham, considered the application of punishment justified only by utility and necessity. "It is the necessity of punishing," said Target, "which makes it legitimate." The theory of the necessity of penalties suited the despotic character of Napoleon I, whose individuality stamped the Penal Code, and caused criminal authorities to exaggerate punishments by making intimidation the essential object. Offenses exaggerated so as to be classified as crimes and misdemeanors (*crimes et délits*) were often far from being punishable as such. The attempt was always regarded as the accomplished act; complicity was treated as actual cooperation; the penalty of death was prescribed with revolting frequency, sometimes accompanied by physical mutilation; the code of 1810 maintained degrading and ignominious penalties, deprivation of the rights of citizenship, the general confiscation of goods, the brand and the pillory, and surveillance by the superior police of the State. Moreover, cases of the most different character were confounded, and Rossi might well have said: "A legislator under the code of 1810 disposed of them all at once, with a sort of carelessness." It is evident that the system adopted comprised, in limited categories, acts which had no points of similarity. In fact, the disproportion between infractions and their penalties was shocking, and the system of aggravating circumstances was inexorable.

Such were the fallacies that distinguished penal science at this epoch and gave rise to the observation that the code of 1810 had been a work more of retrogression than of progress and that it had become indispensable to enact criminal legislation which would be in touch with the civilization of our time, and with the reforms accomplished by Europe since the codification under the Empire.

This is the significance of the code of 1867. As to its inspiring principle, the followers of Rossi prevailed over those of Bentham, thinking that necessity no longer justified punishment; it was a question of equity. The theory of utility still appears in the exercise of the right to punish, not for the purpose of legalizing the right, but for limiting it to the indispensable. The legislator of 1867 regarded the reestablishment of public order as the principal object of repressive legislation. Social power no longer punishes solely to intimidate. It is desired, of course, that the punishment shall act as a warning, but it is specially desired that it should be reformatory—that it should reclaim the morality of the culprit. To epitomize, the theory of the Belgian code is repression exercised within the strict limits of necessity and justice with the hope of reforming the condemned.

This was the dominant thought of the authors of the code, and the principle they applied in the first 100 articles, which treat of general provisions, and in the articles which follow, treating misdemeanors (infractions) and the punishments thereof in detail.

## 3. GENERAL PRINCIPLES.

In the first 100 articles one observes the tendency toward decrease of severity in the provisions governing the attempt, which is subject to the penalty immediately inferior to that for the crime itself (art. 52). The penalty for complicity is inferior to that prescribed for the author of the crime (art. 69). In the matter of repetition of offenses, where the code of 1810 had established a draconian system and obliged the judge invariably to increase the severity of the penalty, the Belgian code, going to the other extreme, decides that the repetition simply justifies a greater presumption of culpability, and always leaves an increase in severity to the discretion of the judge. When it is increased, the repetition does not change the character of the offense or alter the nature of the penalty, the duration of which is alone augmented (art. 54 and following).

On the other hand, the legislator admits a complete and comprehensive system of extenuating circumstances. He allows the benefit of extenuating circumstances to be accorded in all crimes, in all misdemeanors (*délits*), and even in cases of simple trespasses (*contraventions*). The declaration of extenuating circumstances in a criminal case always entails some modification—that is to say, the diminution, to the extent of one degree, at least, in the usual penalty for the crime. In case of misdemeanors (*matière correctionnelle*) the judge has the power to reduce the penalty to the minimum of simple police punishments. In case of trespasses (*contraventions*) accompanied by the declaration of extenuating circumstances, the penalty may be reduced to a fine of 1 franc. In fact, the tribunal can allow extenuating circumstances even in case of repetition of an offense and can reduce the penalty for such offenders. Thus the judge is under no obligations in the matter of severity and has no restraint in that of humanity or indulgence. The system of moderation has been carried to its farthest extent.

The concurrence of infractions is governed by a system intended to prevent the exaggerated effects of the principle of the accumulation of penalties without falling into the abuse of indulgence through the principle of absorption.

The theory of responsibility is not formulated in the Belgian code. The legislator did not believe it necessary to define the conception of accountability, and he left this essential principle of penal law to be construed by jurisprudence and science. At the time when the articles of the code of 1867 were debated in the legislative chambers the importance of questions concerning responsibility was not recognized as it is now. The authors of the code, notably their illustrious leader, M. Haus, saw in the criminal (*délinquant*) the abstract type of normal man endowed with free will and intelligence. They did not consider that the valuation of will and judgment was susceptible of fine gradations which might cause confusion, and they confined themselves to negative formulas—that is to say, to the statement of legal circumstances, the admission of which eliminated responsibility. These are, first, insanity and compulsion (art. 71, c. p.), and, further, when the judge ascertains that discrimination is lacking, that the accused is a deaf mute, or that he is under 16 years of age (arts. 72, 76). It is to be observed that the law does not fix an age under which the prosecution of children is forbidden.<sup>1</sup>

<sup>1</sup> The projected law on the protection of children remedies this omission by fixing 10 years as the age after which prosecution is possible.

The system dealing with the reasons for excluding responsibility is incomplete, and both in theory and practice jurisprudence has been compelled to supply its deficiencies by reference to general principles.

Besides causes of nonadmission of responsibility, the Belgian law allows reasons for diminution thereof and for consequent moderation of the penalty. When the judge finds discernment existing in the very young, or in deaf-mutes (arts. 73, 76), and in case of homicide when there are wounds or blows, or anger has been provoked by extreme and unjust violence or by flagrant adultery (art. 411 and following), the criminal is considered less accountable.

#### 4. CLASSIFICATION OF INFRACTIONS.

In the classification of infractions the code of 1867 adopted a tripartite division of offenses into crimes (crimes), misdemeanors (délits), and police infractions (contraventions), corresponding to the class of penalties applicable to each—criminal punishment, punishment for misdemeanors (peine correctionnelle), and police punishment. The authors of the Belgian code have replied to the objections made to the arbitrariness of this division by saying that as the gravity of the punishment is determined by the gravity of the offense, the division is logical and just.

They have not examined the question with the idea of ascertaining if the modern tendency to make imprisonment the only method of a repressive system, and thus furnish a penalty which varies only in duration, may not admit of the simpler division into two categories—major offenses and minor offenses.

In the classification of punishable acts by the Belgian code, crimes and misdemeanors (délits) are divided and grouped according to the distinguishing features which they present in relation to their object. Crimes and misdemeanors are arranged in nine categories, referring to the safety of the state, rights guaranteed by the constitution, public credit, attacks committed by officers against public order, those committed by private citizens, attacks against the public security, against family order, against public morality, injury to individuals, and injury to property. Simple infractions (contraventions) are divided into four classes, with reference to the severity of the penalty. This grouping, like all divisions of infractions, can only be approximate; precision is impossible; it is rather a standard of measurement. But in redividing these groups into parts, and in applying to this further classification of offenses a further classification of penalties, the legislator is again enabled to insure moderation in the execution of repressive measures.

#### 5. PENALTIES.

The system of penalties remains to be investigated.

In cases of crimes (crimes) the code prescribes as penalties:

Death, which is mentioned in the text, but which in reality has been commuted in Belgium for so many years that capital punishment is never practiced.

Enforced labor for life or a stated time.

Fortress imprisonment (déention) for life or a stated time (in cases of political offenses).

In cases of misdemeanors (délits) and police infractions (contraventions) the code sanctions imprisonment. The duration of imprisonment for misdemeanors (emprisonnement correctionel) is not less than eight days or more than five years.

The duration of police imprisonment is not less than one day or more than seven days.

The deprivation of certain political and civil rights and the placing under special police surveillance constitute penalties commonly applied for crimes and misdemeanors; fines and confiscation of property are applicable to all infractions. The fine for a simple infraction is from 1 to 25 francs. The fine for a crime or misdemeanor (*délit*) is from a minimum of 26 francs. The highest fine, established by certain articles of the code, is 10,000 francs.

If one adheres to the penal code, the fine is a penalty upon which the Belgian legislation has conferred the necessary expediency, flexibility, and variety. In practice, however, this is not the case, and the sentences to pecuniary penalties are characterized in Belgium by the same conditions that are common in other countries—that is to say, the offenders belonging for the most part to insolvent classes, the fine can not usually be collected, and the penalty is transformed into one privative of liberty.

The legislation of 1867, proceeding always with the idea that it was necessary not to overreach the measure of utility or impede the reformation of the offender, suppressed the employment of the brand and pillory and of infamous and degrading penalties. It considered all these provisions of the ancient law, with good reason, impolitic and dangerous.

It also rejected exile and banishment as equally opposed to the reformatory nature of punishment. It could not, in fact, consider deportation and banishment, Belgium not having entertained the hope of a colony in 1867.

The penalty of death being thus commuted by pardon and the fine playing only a secondary part, the entire repressive system of Belgium rests in imprisonment, which has the mission of uniting the three essential conditions desired by the legislator—punishment, example, and reformation. For obtaining these results solitary confinement is the rule, and the cell regulation was adopted by the law of March 4, 1870. The result has been that the classical distinctions between the penalties of penal servitude, solitary confinement (*réclusion*), and imprisonment have lost their importance and consist now only in words. Solitary confinement necessitates considerable uniformity of application. Penalties of this nature differ only in duration and in certain gradations, according to the amount earned for extra work (*pécule*) by the prisoner.

Those condemned for life or to long terms of punishment can not be kept isolated for a period of more than ten years. Further, confinement in cells being considered more severe than the ordinary practice, the law of 1870 prescribed that the duration of penalties ordered by judges and undergone in cells shall be reduced according to an established system, which lessens the period of detention in proportion to the length of time appointed for the execution of the penalty. This measure of clemency, since it applies to all cell imprisonment for periods of more than one month, has weakened the repressive system, especially in its relation to petty offenses (*petits délits*). It is obviously necessary to abbreviate the duration of long periods of solitary confinement, but it is not easy to understand why it is essential or useful to abridge short confinements; and this reduction has all the less foundation since a judge limits himself to imposing the penalty prescribed by the Penal Code without taking account of this reduction.

in practice. The result is that the prisoner (*condamné*) does not actually undergo the punishment to which the judge has legally sentenced him.

To complete the subject of the Belgian penal system it is important to add to the preceding legal provisions the law of May 31, 1888, on conditional sentence and conditional liberation.

This law sanctions a new penalty, conditional condemnation in favor of the prisoner who has not undergone a previous sentence and whose term of imprisonment does not exceed six months. The law provides a new method of carrying out a penalty—conditional liberation in favor of those condemned for a period of less than nine months and who are considered worthy of interest.<sup>1</sup>

On the whole, the code of 1867 showed considerable advance compared with that of 1810, from a humanitarian standpoint. It was inspired by the generous spirit of the epoch. It rejected completely, in its repressive system, the theory of intimidation, and concentrated its efforts in reformation.

But it has, perhaps, failed to take account of the rebellious nature of certain offenders (*délinquants*), and it has allowed too much indulgence to be exercised in regard to them.

Two recent projects of law, not yet discussed by the Chambers, are directed against this tendency. One, under date of July 5, 1889, in regard to the application of solitary confinement, abolished the reduction of penalties allowed by the law of 1870, in favor of prisoners (*condamnés*) who undergo their imprisonment in cells.

Another project, dated April 15, 1890, remedies the defects of the code in regard to the repetition of offenses, and prescribes a system to increase the severity of the penalties in proportion to the number of sentences the offender has served.

#### 6. SPECIAL PENAL LAWS.

The code of 1867 could not embrace all penal interests. Besides the provisions embodied therein, there are special codes, the Military Code, the Rural Code, Forest Code, and a large number of special laws which were not included in the common code, because they treated either of special cases, or of classes of citizens, or of subjects of a variable nature.

The Military Penal Code dates from May 27, 1870. Soldiers, like other citizens, are subject to the provisions of the code of 1867. As members of the army, they are subject to special penal laws which constitute the Military Code. These laws are of an exceptional nature and should be strictly limited in scope; their only justification arising from the exigencies of military discipline, they should interfere as little as possible with the authority of the ordinary penal laws.

The Military Penal Code contains but 58 articles. It provides specially for treason, spying, surrender to the enemy, abandonment of post of duty, offenses against officers, insubordination and revolt, violence and outrage, desertion, embezzlement (*détournement*), stealing, and selling of military effects.

Military penalties are death by shooting, placing in a company of correction, reduction in rank, and cashiering.

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<sup>1</sup> Prins, Law on Conditional Liberation and Conditional Sentences. Brussels, Muquardt, 1888.

The Rural Code of October 7, 1886, considers in articles 86 to 92 a series of rural infractions and provides police-court punishments varying from a 1 franc fine to seven days imprisonment.

The Forest Code of October 19, 1854, contains provisions relating to misdemeanors (*délits*) and trespasses (*contraventions*) committed in the woods and forests protected by the forestry laws. It prescribes for these acts the penalty of fines and in certain cases imprisonment, and charges the administration of the forests with the prosecution. Fishing in streams, which at that date was still regulated in Belgium by Section XXI of the French ordinance respecting forests and waters of 1669, and by the law of Floréal 16, year X, is now governed by the law of January 19, 1883, which places fishing in streams under the forestry administration, thus giving the latter surveillance of waters and woods.

As to special laws, properly speaking, one of the most important because of its social results and its bearing on crime is the law of September 27, 1891, on the repression of vagabondage and vagrancy. This law in a great measure effects this repression. It has established houses of refuge, benevolent institutions, and reform schools under the general name of poorhouses (*dépôts de mendicité*). These establishments are reserved for mendicants, vagabonds, and keepers of abandoned women. These three classes of individuals can be kept for seven years.

The law makes benevolence rather than repression its chief agent in the treatment of children. In articles 25 and following a complete system for the protection of culpables under 16 years of age is organized.

Children of this class who have committed petty offenses (*faits peu graves*)—as is the case in the majority of indictments of children—can not be sentenced to prison. The justice of the peace can either acquit them, or place them under the charge of the Government.

Minors who have committed graver offenses and are indicted before the correctional tribunal and condemned to prison may, at the expiration of their sentences, be placed under the care of the Government until they attain their majority.

The Government places the children in its charge in state benevolent institutions, and, after six months of observation, can transfer them to public or private schools or charitable establishments, or can apprentice them to farmers or mechanics.

This law touches the very source of evil in the struggle with crime—neglected or vicious youth. It effects a decided reform by saving the child as far as possible from prison, thus protecting its future as well as the interests of society.

Among the special laws may be cited the following:

1. The law of December 20, 1852, in regard to the repression of offenses against officials of other governments, and the law of March 12, 1858, on crimes and misdemeanors which menace international relations.

The object of these two laws is the prevention and punishment of offenses, attacks, and plots against the officials of foreign governments. Based on the right of peoples, the laws are derived directly from the principle of political neutrality of countries, and from the tradition which opens Belgian territory to political refugees and risks making it an asylum for conspirators. International relations impose obligations which are sanctioned by the laws of 1852 and of 1858.

2. The law of July 7, 1875, is similar in import. It punishes those

who offer or propose to commit certain crimes and those who accept the offers. It owes its existence to the fact that, in 1873, a copper-smith of Seraing addressed a letter to the archbishop of Paris, offering to assassinate Prince Bismarck for the sum of 60,000 francs. The archbishop delivered the letter to the Belgian Government, which could not condemn the man, the case not coming under the scope of any penal law then in force. It was to remedy this omission that the Government passed the law of 1875.

3. The law of October 15, 1881, concerned the storing, sale, and transportation of gunpowder, dynamite, and all other explosives. For infractions of the regular provisions on this subject it prescribes imprisonment of from fifteen days to two years and a fine of from 100 to 1,000 francs. Imprisonment can be extended to five years in case death results from the infraction. A royal decree of December 1, 1891, combined in one all the provisions concerning the application of this law.

4. The law of December 26, 1881, punishes forgeries committed in the statements and accounts of companies. The balance sheet, according to this law, is recognized as soon as it has been inspected by the shareholders or partners. Those who make use of the forged statements are punished in the same way as the author of the forgery. The punishment is confinement and a fine of from 26 to 2,000 francs.

The court of annulment (cassation) having often decided that forgeries in accounts were not provided for in the penal code, it was necessary to rectify this oversight by the law of 1881.

5. The law of February 28, 1882, on hunting was intended to make better provision than in the past for these three objects: The repression of poaching, the protection of agents of the public service, and the preservation of game. Many petitions have been addressed to the Chambers asking efficacious measures against the increase of poaching and against the source of the evil. Poachers were encouraged by the ease with which they could dispose of the products of their misdemeanors and by the lack of severity in the punishments incurred. The law of 1882 endeavors to change this state of affairs.

6. The law of August, 1887, on public drunkenness is the first timid move of legislation in the struggle against alcoholism. The law raises to the importance of misdemeanors public drunkenness; the act of tavern keepers or dealers who sell liquor to persons obviously intoxicated or to minors under 16 years who are not in charge of other persons; the act of proposing or accepting a challenge to drink when the acceptance involves drunkenness; the act of peddling or selling spirituous liquors outside of cafés, inns, or licensed saloons. It prescribes a penalty also for selling victuals or liquor in houses of disrepute.

The penalties for these infractions of law are fines and imprisonment, and a repetition of any one of them renders the offender subject to special measures for increasing the severity of the punishment. The license to keep a tavern may be denied.

7. Law concerning the press. The Belgian code treats of the press in article 18. It declares the liberty of the press, prohibits censorship and the deposit of bonds (cautionnement); asserts, contrary to the general theory of complicity, that when the author of an article is known and living in Belgium neither the editor, printer, nor distributor is subject to prosecution.

The other provisions relative to the press are contained in the decree of July 20, 1831, in the law of April 6, 1847, and in article 384 of the Penal Code of 1867.

The characteristic feature of the Belgian press legislation is its system of simple repression—that is, the Belgian laws prohibit all preventive measures, and authority intervenes only to provide for offenses committed.

Offenses (*délits*) of the press are not defined by the code. According to doctrine and jurisprudence, it is a press misdemeanor (*délit*) when an offense against common law, committed through the press, constitutes an abusive manifestation of sentiment. The jury must determine the character of the act. A simple act (*fait matériel*) committed by the press without intention does not constitute a press misdemeanor. The following press offenses may be specially mentioned: Malicious attack on the obligatory force of the law, provocation to disobey it; malicious attack on the constitutional authority of the King; against the inviolability of his person; against the rights (*droits*) of his dynasty; against the laws (*droits*) or authority of the Chambers; malicious attack against the character of an individual; exhortation to duel—when these offenses have been committed through the medium of the press.

It is to be observed that the word “press,” as understood by the constitution, includes printed matter, original manuscript, lithographed work, and illustrations, as well as written articles.

8. Industrial legislation in Belgium is in process of preparation. Among the enacted laws are the following:

(a) The law of October 21, 1887, on the regulation of the payment of salaries to laborers.

This law demands that workmen shall be paid in specie or legal-tender notes (*monnaie fiduciaire*), and that salaries not exceeding 5 francs a day shall be paid at least twice a month. It prohibits the payment of salaries in taverns, saloons, stores, shops, or places adjoining them, and it also forbids employers to impose on their workmen conditions that will hinder a free use of their wages.

It enforces these provisions by punishing those who fail to comply with them with fines of from 50 to 2,000 francs.

(b) The law of December 22, 1889, on the work of women, youths, and children in industrial establishments.

This law prohibits the employment of children of less than 12 years, and of girls and women of less than 21 years of age, in the subterranean work of mines, diggings, or quarries. It prohibits also, under certain circumstances and conditions, the employment of children, youths, and girls, or of women of less than 21 years of age in perilous work or that exceeding their strength.

It prescribes for managers and chiefs of industries who knowingly violate the law fines which can be raised to 1,000 francs. It punishes with imprisonment (in virtue of arts. 269–274 of the Penal Code) those who place obstacles in the way of the authorized legal surveillance.

9. Fiscal legislation.

The law of August 26, 1822, is the most important, and the groundwork of all laws relating to the administration of direct taxes and internal revenues. Applicable originally only to internal revenues and tariff duties, some of its provisions have been extended to include certain direct taxes. The study of this law is made difficult by the numerous modifications which it has undergone, the decrees as to the execution thereof, and the special laws which have been connected therewith. For our purpose it will be sufficient to cite the law of April 6, 1843, on the repression of fraud, and that of August 6, 1849, on merchandise in transit.

The law of August 26, 1822 (Chap. XX, arts. 205-232), prescribes fines and penalties in general—that is to say, seizures, confiscations, imprisonment, and the closing of factories, workshops, or mills.

The law of 1843 on the repression of fraud (arts. 18-36) repeals or modifies a number of articles of the law of August 26, 1822. The two laws are closely related, and in a way constitute but one. The object of the last is to strengthen the legislation of this epoch, when the high standard of the laws was a temptation to fraud. Since then the Government, by a measure of February 27, 1852, and other decrees, has granted certain facilities to commerce and industry, within the customs territory (*dans le territoire réservé de la douane*). The law of 1849 on transit, modified by the laws of March 3, 1851, of May 1, 1858, and of May 27, 1861, established in Chapter V an entire system of penalties—that is, of fines for infractions of the law.

The Government can intervene in fiscal matters (law of 1822, art. 229) whenever the affair is modified by extenuating circumstances, or when it may be supposed that there was negligence and error rather than premeditated fraud.<sup>1</sup>

Belgium does not possess a special penal law on bankruptcy. The law of April 18, 1851, on failures, bankruptcy, and suspensions (*sursis*) defined simple bankruptcy and fraudulent bankruptcy, and gave, in articles 573 to 578, the conditions of the two sorts of bankruptcy; and the Penal Code (arts. 489-490) provides the punishment for the simple bankrupt and the bankrupt by fraud and for those who are guilty of certain impositions in case of failure.

Belgian legislation does not recognize the misdemeanor (*délit*) of usury as such. It punishes the act of loaning money at a rate above legal interest only as an abuse of confidence; for example, when the lender, taking advantage of the passions or weaknesses of the borrower, habitually furnishes money at a rate exceeding legal interest. This is the meaning of article 494 of the Penal Code. Apart from these circumstances, there is complete freedom in the loaning of money at interest. A law of May 5, 1865, declares that the rate of common interest is freely determined by the contracting parties.

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<sup>1</sup> For Belgian fiscal legislation, see general law of August 26, 1822. Commentary by H. P. Adam, Brussels, Ad. Wahlen & Co., 1837. Code of direct taxes, customs, and internal revenues, Guyot, publisher, 1871.

## THE JAPANESE CODE OF CRIMINAL PROCEDURE.

By the Honorable KEIGO KIYOURA,

*Ex-Minister of Justice of Japan.*

The Japanese Code of Criminal Procedure now in force was promulgated in October, 1890. Though it has many improvements over the old code, the experience of ten years shows that the present code has many defects and omissions. In 1895, with a view to remedy those defects, the ministry of justice appointed a committee for the revision of the Code of Criminal Procedure, and that work was carried on by this committee till its transfer to the law commission, under the direct control of the imperial cabinet.

The preparation of the Civil and Commercial codes, which were published in April, 1896, and in March, 1899, respectively, and which are now in operation, was the great work of the law commission. When the work of codification was finished the committee which had been appointed by the ministry of justice for this work was abolished and the work of the revision of the Code of Criminal Procedure was transferred to the law commission, which consists of able jurists and men of practical experience both in and out of Government service.

The Government, which highly esteems the rights and liberties of the people, has taken steps to adapt the conduct of the courts in their treatment of criminals to the new condition, without waiting for the whole revision of the Code of Criminal Procedure. Several important amendments were introduced into the code in March, 1899, to meet emergencies, without influencing the whole code. The following are the three amendments:

1. The abolition of articles 87, 88, and 89 of the Code of Criminal Procedure, providing for solitary confinement.
2. The insertion of words implying the possibility of release on bail in the provisions of article 158 of the code.
3. An amendment to the provisions of article 203 of the code adopting a more accurate way of pronouncing sentence. Thus:

In pronouncing sentence the court shall state sound reasons for conviction, resting on the facts and proofs of guilt furnished, and shall show that the law applies to the actual case and the reasons therefor. In case of failure to convict by innocence or of placing beyond prosecution the reasons shall also be given.

The following reasons for these amendments may be given:

1. In former times in Japan the confession of the accused was extorted during criminal proceedings. In 1879 that principle was entirely abolished and the civilized principle of convicting on proof was adopted instead. After that time there was no longer extortion of confession during the trial. But there were always some cunning men among criminals who tried to escape conviction by destroying proofs against themselves, and therefore it was necessary to provide for the *mise au secret* in articles 87, 88, and 89 to meet that evil.

ART. 87. During the preliminary examination the judge may, if he believes it necessary for the discovery of the truth, order, either by the decision of the public

procurator or on his own authority, that the prisoner be placed in solitary confinement.

ART. 88. Solitary confinement means isolation, interdiction of communication with anyone, and sending or receiving letters, papers, or other objects without the permission of the judge of the preliminary examination (trial judge).

ART. 89. Solitary confinement is not to continue more than ten consecutive days unless the order therefor is renewed every ten days. In case of renewal the trial judge must report, showing cause, to the president of the court. The judge must question the accused at least twice during each period of ten days.

To carry out these provisions solitary rooms were assigned for persons under accusation, in addition to the common cells. Those persons in solitary confinement were forbidden to hold any communication with their family, friends, or counsel. This system undoubtedly prevented the destruction of criminal proofs, but on the other hand it came to be felt that this was an unduly oppressive measure to extort confession. The Government, therefore, fearing abuse of this system and valuing the rights of the people, abolished it. After all, few prisoners are found who can not be treated after the general plan, and it is only when urgently necessary that a prisoner is confined alone in a cell. The provision for such exceptional cases, an amendment to article 85 of the Code of Criminal Procedure, is as follows:

ART. 85. An accused person under arrest may receive, in the presence of an officer, the visits of persons from the outside.

Letters or other documents may be exchanged between the prisoner and persons outside only after being examined by the trial judge or by the public procurator.

The trial judge may, if he deem it necessary, remove the accused to a solitary cell and forbid any communication with outside parties or to receive or send letters, documents, or any other thing.

The third paragraph is an addition to the code. When these amendments were published a criticism appeared in a journal published by a foreigner to the effect that these provisions were but another form of solitary confinement, and that the torture of solitary confinement continued in essence. But this criticism is groundless. The new system of confinement in a separate cell is on quite a different basis from the old system of solitary confinement in a dark room. Anyone visiting prisons can easily see the truth of this statement. As to the "torture" referred to by this journal, there is no trace of it.

2. In Japanese courts of justice release on bail had rarely taken place before the amendment was passed to which reference has been made. It had been a common belief that if persons were released before conviction they would either escape or would destroy the evidences of their guilt. This led to a great increase in the number of persons held for trial, and consequently in the expenses of maintaining prisons of detention. It also curtailed the liberty of persons under accusation. The recent amendment, resting on the noble sentiment of appreciation of the rights and freedom of the people, has removed this restraint on their liberty. The minister of justice issued an order to all the public procurators to release on bail all possible cases. The number of persons under detention has been greatly diminished since then, but no proof has been received of any increase of those seeking to escape trial or of the destruction of criminal evidence. The amendments and the order of the minister of justice have been of great assistance in administering justice.

3. Previous to the passage of the amendment the provision for pronouncing sentence was as follows:

When the court of justice shall pronounce sentence it shall assign the grounds on which it rests in fact and law and show all the proofs furnished. Even in case

of failure to convict through innocence or of placing beyond prosecution the reason shall be shown.

This was too simple and inexact. It failed to show what was the special guilt, and accused persons and public procurators have felt difficulty in appealing to a higher court, and to avoid the difficulties involved some have repudiated their right of appeal to a superior court. This is contrary to the desire of the Government. A want of clearness in the statement of laws often raises a doubt about their own responsibility in the minds of judiciary officers. The code, even before the addition of the amendment, never intended to let such officers avoid their responsibility.

## II.

### RE COURSE TO HIGHER COURTS.

In Japan when condemned prisoners wish to appeal to a higher court they must pay in advance a fixed sum of money as security to the court. This was fixed by special laws issued before the existing Code of Criminal Procedure.

The law of 1885 providing for the appeal of cases of misdemeanor says, in article 3:

The accused, in case of appeal, must pay in advance a sum of ten yen [\$10] as security for judicial expenses to the appeal court.

The law of 1890 providing for the appeal of felony cases says:

ART. 1. The accused who has been found guilty of felony must, in case of appeal, pay in advance the sum of twenty yen [\$20] as security for judicial expenses in the appeal court.

ART. 2. Any poor person who has been found guilty of felony who is unable to pay in advance a fixed sum of money as security may apply to the appeal court to be exempted from that payment at the same time that he presents the petition of appeal to it.

ART. 6. If the exemption be not allowed the appeal has no effect.

In addition to these two laws there is a regulation as to additional payments for the expenses of witnesses or experts to which the accused is liable, either in case of misdemeanor or of felony. As to the previous deposit of a sum of money with the court to meet such fines and indemnities as may be due from the accused on the conclusion of the trial, in case there is an appeal to the supreme court, an imperial ordinance, issued in 1876, says:

If the accused who is sentenced to a penalty of fines and indemnities appeals to the supreme court, he must send to the original court a deposition of his appeal and at the same time deposit with the clerk of the latter court a sum of money equal to ten per cent of the amount of fines and indemnities, otherwise he is not entitled to appeal to the supreme court. If the supreme court decides against the accused the whole or a part of the amount of that money shall be confiscated by the same sentence.

These laws and regulations are intended to prevent groundless accusations; but many poor persons, who have no means to pay a security of this kind, must abide by the decision of the lower court without appeal to any higher tribunal. That is contrary to a just appreciation of human rights. In the parliamentary session of 1899 a bill repealing the laws and regulations just referred to was introduced, and became a law in March, 1900. In consequence the number of cases of appeal has already considerably increased. Some arrangement may be necessary to meet the consequent increase of expenses in the superior courts. The number of judges, clerks, and

the means of meeting expenses must be gradually increased. In the prisons of detention there is also a tendency to increase the number of those persons held for trial. Criminals, as a rule, are from the poor and uneducated classes, and ignorant men are apt to appeal without reason. The repeal, therefore, of these laws and regulations is bound to exercise much influence on the present judicial system and in the national economy. The final effect it is too early to note, but there is cause for anxiety. Longer experience must be had before it can be justified.

### III.

#### INSTRUCTION ISSUED BY THE MINISTER OF JUSTICE TO THE PUBLIC PROCURATORS IN FEBRUARY, 1899.

[No. A. 44 of the bureau of civil and criminal cases in the ministry of justice.]

*To the public procurator-general of the supreme court, chief public procurators of appeal courts, and head public procurators of the district courts:*

This is to instruct you that the time is near when foreigners of every nationality will be brought under our nationality by virtue of new treaties. It appears to me urgent that many improvements in the administration of our judicial system should be made, and the best plans for this purpose must be considered. The duties of public procurators especially are closely connected with the rights and liberties of the people. All public procurators, therefore, while not neglecting the prompt discharge of their duties, must conduct themselves with circumspection and kindness toward the people. It must be their special care to see that the rights and liberties of the people are not violated. I sincerely trust that the public procurators are always very careful about such matters; but as this is an important period for us, I take advantage of this opportunity to draw the attention of these honorable men to the following points, that you may know in what direction you must most carefully move:

I. It is not infrequently said that the judicial police officer who arrests a suspected person applies to the public procurator for his prosecution while the case is still in doubt. The public procurator is sometimes tardy in action and the suspected person is set at liberty after long delay or is brought to trial without any evident grounds. In such cases the public procurator hopes for a chance to detect criminal proof in the preliminary examination or in the open trial to which he has brought the suspected person on mere assumption. That is absurd and is in contradiction to the principle of regarding the rights and liberties of the people. Hereafter this absurd practice must not be followed by the public procurator in any case. When any accusation is brought to them they must make minute inquiry into the facts and must institute proceedings in the courts only when they are reasonably sure that the accused will be found guilty on the ground of criminal acts.

II. This warning is also addressed to judicial police officers. In the performance of their duties they must not infringe upon the rights of the people. The procurators must impress this upon them. If the charge that comes to a police officer is of a trifling nature, and there is no certain proof that the offense was committed, or if there be evidence that it was committed, but if it is of so trifling a nature that punishment is not necessary for public safety, then it is better that

an inquiry into the facts should be made at once, the accused set at liberty, and a report be made to the procurator connected with the case. It is beyond their power to set any restraint upon the liberty of the accused.

III. So long as there is no danger of the escape of persons accused of crime, or of the destruction of proofs of guilt, they are to be set at liberty on bail. Recent statistical reports show that in the thirtieth year of Meiji (1897), 28,879 persons were in prison in Japan undergoing preliminary examinations. Of that number only 667 were released on bail, less than 2 to 100. Is that well? The existing regulations for releasing persons on bail are not carried out, and the authorities may naturally be blamed. There must be an endeavor to carry out these regulations. While a charge is pending during a preliminary examination or during open trial the suspected person should if possible be set at liberty on bail. If the accused do not apply for such release themselves, the public procurator must take the initiative in order to shorten the time they are detained in prison.

IV. I hear frequent complaints of the tardiness of judicial proceedings. This often has its root in the people's ignorance of rules and regulations and the technical steps in courts, but the courts themselves have some responsibility in this matter. Let us see what the statistical criminal reports show. In 1897 the total number of appeal cases, new and old, pending was 5,935. Of those, 4,856 were decided during the year, or one and four-fifths cases only were decided by each appeal court daily. Fifty-one days were spent on each case, and each person was detained in prison 49 days. Though this delay may have been caused by the complexity of criminal facts, the magistrates in charge are admonished to a more speedy administration of their duties. In district courts and other inferior courts simple cases for which ample evidence is supplied must be prosecuted as rapidly as possible. Unless objection is offered by the accused, judgment should be pronounced on the day of prosecution or on the following day. In appeal courts some more speedy way of proceeding must be devised, that the period of detention in prison may be shortened as much as possible.

Superior and inferior officials are to consult as to any improvements which may be carried out, that the best methods may be found and adopted.

In witness, this 28th day of second month of thirty-second year of Meiji (February, 1899).

KEIGO KIYOURA,  
*Minister of Justice.*

#### IV.

##### PROGRESS IN PREPARATION OF DRAFT OF REVISED CODE.

The Japanese Penal Code now in force was published in July, 1880. Up to that time a written criminal law had been in operation throughout the land. It was a compilation from the old Japanese law and the modern Chinese laws of two dynasties, Min and Shin.

The Penal Code now in force was prepared, by order of the Government, by the French professor, Mr. Boissonade, then legal adviser to the Government. It was drawn in imitation of the French Penal Code, so that the codification and arrangement resemble that code closely. It is a great honor to France that its Penal Code has been copied by a majority of the European states since it was codified, in the early part of the nineteenth century. But with the progress of

civilization there have been many changes in the world, and many of the provisions of that code have been found inconsistent with accepted principles and practical convenience. In the European states, therefore, revision of criminal laws is constantly going on. For a similar reason a committee was appointed by the minister of justice in 1892 to revise the Penal Code. After frequent conferences the draft was completed, but, like the Code of Criminal Procedure, it was put into the charge of the law commission, made up of able Japanese jurists and men of long practical experience. Later a final draft was prepared and presented to the Government, which will probably be adopted and put into force. Only those principles which differ from the provisions of the Penal Code now in force are enumerated here.

I. The provisions for territorial and personal jurisdiction in the draft for the Revised Penal Code are wanting in the Penal Code now in force. The reason of their importance it is needless to state. The whole country has been opened to foreigners of every nationality, through the operation of the Revised Treaties, and these provisions have become of great force. The new provisions are as follows:

ART. 3. The law applies to any crime or crimes committed by any person or persons within the territory of the empire. The same applies to any crime or crimes committed in or on merchant or war vessels of the empire abroad.

ART. 4. The law applies also to any major crime or crimes committed by any Japanese subject or by any foreigner against the imperial family or the empire abroad.

ART. 5. The law applies also to any major crime or crimes committed by any Japanese subject or subjects abroad with regard to life, person, liberty, property, or credit.

The same applies to any crime or crimes of this kind committed by any foreigner or foreigners against any Japanese subject or subjects abroad.

ART. 6. The law applies to any crime or crimes committed by any public servant or servants of the empire with regard to his or their duties abroad.

ART. 7. Though sentence may have been pronounced by a foreign court, that does not prevent further penalty by a Japanese court. But when the penalty prescribed for the criminal abroad has been wholly or partially executed abroad, it may be lessened in degree or remitted in the empire.

II. A new classification of crimes into major and minor, instead of the three classifications of the existing code, has been adopted for the Revised Penal Code.

In the Penal Code now in force offenses are divided into three classes: Felonies, misdemeanors, and police offenses (trespasses; contraventions, according to the French Penal Code). But there is in this classification no measure for the difference between a felon and a misdemeanor in quality. The only distinction is in the name of the offense and duration of the penalties. Hence offenses can not be punished according to the degree of their criminality. By the new revision felonies and misdemeanors are put into one catalogue, called major crimes, and the time of imprisonment is longer than in the existing code. Trespasses or contraventions are put in another category as differing in quality and as requiring punishment chiefly to prevent the repetition of offenses. These are known as minor offenses or crimes. The classification of penalties corresponding to crimes is as follows:

ART. 10. Death, confinement, imprisonment, and fines shall be the chief penalties for major crimes.

Attachment (sic) and police fines shall be the chief penalties for minor crimes.

Deprivation of civil rights, special supervision of the police (police surveillance) and special confiscation shall be accessory penalties.

According to the draft of the Revised Penal Code the death penalty is to be by hanging, as at present. Confinement and imprisonment may be for a limited term or for life. Temporary confinement or imprisonment may be for one day or up to fifteen years. The penalty of simple imprisonment does not include labor. The fine as a penalty is 1 yen (\$1) and upward. The penalty of attachment may extend from one day to one month. The police fine is from 10 sen (1 sen =  $\frac{1}{4}$  of a cent) to 30 yen, inclusive.

### III. Provision for conditional sentence in the draft of the Revised Penal Code.

Why provision for the postponement of the execution of the penalty has been introduced needs no explanation. Such provisions have been recognized theoretically as necessary, and it has been found that practically there is such a necessity, though there are few penal codes in the world containing such a provision. In the states having such enactments the codes differ in their provision for the same purpose. Those adopted in the new draft are here mentioned:

ART. 33. In the case of the following-named criminals, who may have been sentenced to imprisonment for one year or to confinement for six months or less, the execution of the penalty may be postponed, according to circumstances, from one to five years, inclusively, calculated from the day the sentence was pronounced:

1. Criminals who have not been subjected to any penalty for a major crime, except fines.

2. Criminals who, though they may have suffered some other penalty than a fine for a major crime, have not been subsequently punished for a major crime except by a fine for ten or more years after the expiration of the previous penalty.

ART. 34. The preceding article does not apply to criminals who have been deprived of their civil rights or who have been put under police surveillance.

ART. 35. In the case of criminals under suspended execution of sentence who shall commit any major crime punishable otherwise than by fine within the period of suspension, or who shall subsequently be punished by other than a fine for a major crime, for a crime committed before the suspension of the execution of sentence, or who shall be discovered subsequently to be persons who have been punished with other penalty for major crime than a fine, on account of some crime before the declaration of suspension, the declaration of suspension shall be canceled so far as it does not relate to criminals mentioned in the second paragraph of article 33.

ART. 36. If the period of postponement of the execution of penalty shall have passed without that suspension being canceled the sentence shall not be executed. ("The judgment of punishment shall be extinguished.")

### IV. Raising the age of responsibility of minor criminals.

According to the Penal Code now in force 12 is the criminal age of responsibility. No act of children under that age is deemed a crime. That idea is inherited from the old legislation. In ancient times the correction of minor offenders was imperfect, and the object of punishment was not like that of modern times. Physiology teaches us that the human body reaches its development about the age of 14, and in later years wiser arrangements have been made for the correction of criminal children. The responsible age has been raised to 14 years, for the purpose of diminishing the punishment of children and to prevent the repetition of offenses. In the Revised Penal Code if a child of 8 or older commits a major crime it may be corrected for ten years or less, according to circumstances. Under the existing code, children between the ages of 12 and 16 are either exempt from penalty or it is diminished in severity. Between the ages of 16 and 20 the penalty is diminished in degree, but they are not exempt from punishment. It is difficult to ascertain the exact accountability of children, and it is manifestly absurd to diminish the penalty according to age if they have a full understanding of the criminality of their

act. By the new draft the penalty may be lessened between the ages of 14 and 20.

V. The cumulative sentence.

The present Penal Code adopts the principle that one can not be punished for crimes committed previous to the one for which he is at the time sentenced, whether of equal or less gravity than the one for which he is tried. A person who has committed one crime receives the same penalty as one who has committed many crimes. To avoid this inconsistency the new code has adopted the system of the cumulative sentence, with a view to punish each offense. The exception to this rule is when there is a concurrence of a crime with other crimes punishable by death or imprisonment for life. As to short terms of imprisonment and the cumulative principle it is provided that the maximum of the penalty for the gravest crime that has been committed, with the addition of half the same length of time, be made the maximum penalty applicable for all the offenses committed, provided this maximum is not greater than the sum total of the maximum penalties for all these crimes.

VI. Increasing the penalty within a certain period of time on the repetition of the offense.

Under the present code, penalties are increased on repetition of the offense, without reference to the kind of offense or the number of days between the first offense and its repetition. Many trifling offenses do not need this increase of penalty and in greater crimes the increased penalty does not prevent their repetition under the present code. The new draft increases the penalty in certain cases:

ART. 71. Any person who shall have been imprisoned for a crime belonging to a certain class of crimes shall be deemed a repeater if within ten years after the execution of his penalty he shall commit a similar crime. The same law applies to any person who has been found guilty of death and who has been exempted from execution, in case he shall be guilty of the same crime within ten years after such exemption from the death penalty.

ART. 72. The increase of penalty on the repetition of an offense shall be twice the legal term of imprisonment for that offense.

## **JAPANESE PRISONS.**

### **I.**

#### **A SCHEME FOR CENTRAL SUPERVISION OF PRISON ADMINISTRATION.**

The prison administration of Japan originally formed a part of the police administration under the ministry of home affairs. The central office of prison administration was carried on by a small section of the ministry, which consisted of only 5 officials. Later, in November, 1897, the section was replaced by a new bureau established in the ministry, consisting of 1 director, 1 prison superintendent, 10 clerks, and 2 architectural assistants; the supervision became comparatively formal. The Government, knowing the imperfection of the system, was dissatisfied, and the bureau and the entire prison administration were transferred from the home office to the ministry of justice in July, 1900. Under the revised scheme 1 prison superintendent, 1 secretary, 1 architect, several clerks, and architectural assistants were added to the original number of functionaries. This increase of force was necessary because it had been decided that from the 1st of October prison expenses were to be met from the central Government treasury. As several improvements were to be made, and the work of the prison bureau was sure to increase in the attempt to secure uniformity in prison administration throughout the country, the bureau was divided into three departments:

- I. Department of prison management.
- II. Department of statistics.

- III. Department of prison expenditures.

Department I controls everything pertaining to pardons, rehabilitation, parole, temporary release from police surveillance, the execution of the death penalty, the maintenance of discipline and health within prisons, and other general business.

Department II has charge of all statistical reports relating to prisons and prisoners.

Department III has charge of all prison labor and prison expenses.

Any plans for prison building or repairs are prepared by competent architects appointed for the purpose in the architectural section of the bureau of general affairs in the ministry of justice.

### **II.**

#### **THE SCHOOL FOR UPPER PRISON OFFICERS.**

In 1890 a school was established for the training of higher prison officers. The course was six months, and after the first class had passed through it the school was closed. But the Government finding it necessary to obtain competent officers to satisfactorily carry out the improvements that had been undertaken, again established a

special training school for prison officers, in the city of Tokyo, in 1899. The students are divided into Divisions A and B. Those in Division A are selected from officers now in service, clerks and wardens, and their term of study is six months.

Division B is made up of students selected from candidates who have qualifications for ordinary civil officers, that is the same grade as the graduate of an ordinary middle school. The term of study is one year. The programme in both divisions is penology, prison hygiene, criminal psychology, statistics, anthropometry, the maintenance of ex-convicts, methods of reformation, the Penal Code, Code of Criminal Procedure, soldierly exercise, practical drill in prison management, an outline of constitutional law, the Civil Code and administrative laws.

The first ten students of Division A were graduated successfully in February, 1900. They at once returned to their respective prisons throughout the country and in turn are training competent wardens. The second term of Division B began early in March, and from that date the term of Division A was likewise made a year in order to secure better results.

Besides this Government institution there are also in Tokyo two private schools established by Buddhists last year. One is for chaplains now in service, and the other is for men who intend to become chaplains. In both schools lessons with reference to prison discipline and information are given.

In 1898 penology and other subjects related to prison affairs were introduced into the programme of the Law College, Imperial University. Imitating this example, the private law schools have successively introduced penological subjects into their courses. The tendency to study prison affairs as subjects of great importance is constantly increasing. For the revision of the Penal Code which is now going on, it was found necessary to add to the law commission an able official with large penitentiary experience for the benefit of his opinion.

### III.

#### AMENDMENT OF PRISON REGULATIONS.

The prison regulations published in 1889 were partially amended in 1899. The chief amendments were as follows:

##### 1. Increase in the expense and quantity of food.

By the amendment, the chief food (consisting of rice and wheat boiled together, which has been supplied in the proportion of 8<sup>1</sup> go for each person per day) has been increased to 9 go in quantity. The expense of 2 or less sen (1 sen=4 cent), appropriated for additional food for each person per day, has been increased to 3 or less sen, thus furnishing much more nutriment for the support of the prisoners. The food is somewhat different for foreign prisoners, they receiving a good quantity of the food best suited to them.

##### 2. The change in the division of earnings.

In the original regulations each felon was allowed four-tenths of his earnings, but by the amended regulations each felon is allowed from one to five tenths, each misdemeanant from two to six tenths. Besides

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<sup>1</sup>One go is equal to about a third of a pound; 9 go equals, therefore, three pounds.

this distinction in the grades there is also a distinction between prisoners belonging to the same grade, as follows:

Two-tenths are allotted to each felon imprisoned for the first time.

Three-tenths to each misdemeanant imprisoned for the first time.

One-tenth to each felon imprisoned for the second time.

Two-tenths to each misdemeanant imprisoned for the second time.

But to any offenders imprisoned for the second time, who have worked industriously for the preceding year and more, their earnings may be allotted as to first offenders.

Three-tenths are granted to each felon to whom "one piece of medal" has been granted.

Four-tenths are granted to each misdemeanant to whom "one piece of medal" has been granted.

Four-tenths are given to each felon to whom "two pieces of medal" have been granted.

Five-tenths are given to each felon to whom "three pieces of medal" have been granted.

Six-tenths are give to each misdemeanant to whom "three pieces of medals" have been granted.

### 3. The congregate system for labor.

Prisoners were originally divided into five classes, according to their industrial ability, and different amounts of work were given to the different classes; but owing to the difficulty in promoting the prisoners according to their improvement, the original system has been changed and it has been determined that the industrial ability of an ordinary person shall be the measure of the ability of ordinary prisoners, except children, the infirm, the disabled, and the unskilled, to whom work will be given according to their ability.

The Government encourages the education of minor offenders and makes a distinction in treating them, distinguishing between them and major offenders. It also properly esteems the rights and liberties of accused persons and treats them with leniency when under prison discipline. On application they are allowed to hear sermons. Their health is carefully maintained and they are required to walk outside the cells more than half an hour daily.

The amendments to the prison regulations referred to are to allow superintendents to treat prisoners with leniency at their discretion. This is only a partial reform in prison affairs. The Government looks forward to more fundamental reform after the Revised Penal Code shall have come into operation.

## IV.

### THE CONFINEMENT OF FOREIGN CRIMINALS.

As a result of the operation of the Revised Treaties in July, 1899, foreign criminals have come under the care of our prison authority, and experience shows that this work has been successful. Much attention has been paid to European manners and customs and to the individual relations of foreign prisoners. Their health has been carefully looked after and their treatment has been just and impartial. The foreign prisoners are satisfied and there is no complaint in the community of foreign residents in Japan. The chief items in the treatment of foreign prisoners are as follows:

1. Dress.—Foreign prisoners are generally supplied with loose clothes with long sleeves in Japanese style, but during work they are

required to wear closer fitting garments, for convenience. Japanese prisoners at work also wear these closer fitting garments, which are more like European clothes. In making the garments a difference is made in those for natives, who sit on the floor, and foreigners, who sit on chairs.

2. *Food.*—There is a great difference between the food of natives and foreigners. Natives are supplied with food made of rice and wheat boiled together, with fish and vegetables as accessories. Foreigners are supplied with food better suited to their taste.

3. *Cells.*—The separate cell system is adopted for foreign criminals and they are provided with tables, chairs, and beds. Windows are put in at the back and front for air and light. The prisoners are given work in their cells. In winter, when the weather is severe, stoves are provided in some localities.

4. *Exercise.*—Walking and bodily exercise are permitted an hour each day and bathing every fifth day in summer and every tenth day in winter. Work is discontinued on our national holidays and in addition foreign criminals are allowed to observe Christian holy days.

## V.

### GOVERNMENT SUPPORT OF PRISONS.

For a long time prisons have been supported by local taxation with consequent lack of uniformity in administration. It has been difficult to obtain the consent of local officials to reconstruct prisons, as that would increase local taxes. It was therefore considered best to transfer the support of prisons from the local purse to the central government treasury. Since 1890 a bill with that intent has been often presented to Parliament, but in vain. Last year, however, the bill was passed, in the fourteenth session, and was published as law. Consequently all prison expenses in Japan are now defrayed from the central government treasury. It is believed that this will secure uniformity in administration, and that it will expedite further prison reform in the land.

## VI.

### REFORM SCHOOLS.

At present the provisions for reform schools are imperfect and but eight are in fairly good working order—the Tokyo Reform School, the Chiba Reform School, the Miye Reform School, the Okayama Reform School, the reform school in the poorhouse of Tokyo, the Charity Association of Tokyo, the Public Gratuitous Relief Association of Tokyo, and the Domestic School of Mr. Tomeoka. The total number in these associations is only about one hundred. It is with great regret that it is seen that with the progress of civilization the number of juvenile criminals increases. Pressed by the necessity of meeting this evil, the Government has recently passed a law called the "Reform Institutions Law," passed by Parliament in February, 1900, requiring every prefecture to have at least one reform school for poor children, to be supported by local taxation. Admission to the school is limited to the following children:

1. Children between the ages of 8 and 16 who are found by the

prefect to be idle, begging, or under the influence of evil persons and who have no proper parental or other guardianship.

2. Children who have been sentenced to the reform prison.
3. Children who may be kept in the house of correction with the approval of the court.

These different classes are to be kept apart in the reform schools and are not to be allowed to mingle, that there may be a chance to reform them. No child is to be kept in the reform school beyond the age of 20, except those belonging to the third class. The prefects have authority to allow the children to withdraw from the schools temporarily under certain conditions. If the children break those conditions they are promptly returned to the schools. The maintenance of the children must be furnished by those whose duty it is to support them.

It is hoped that such schools will soon be established in each prefecture.

## VII.

### DELEGATION TO THE INTERNATIONAL PRISON CONGRESS.

Two delegates were appointed by the Government to attend the International Prison Congress in Belgium held in 1900: Mr. Shigejiro Ogawa, prison superintendent, and Mr. Toshikadu Ishiwatari, councilor in the ministry of justice. Mr. Ogawa was present at the congress held in Paris in 1875. Our present prison reforms being largely due to his influence, he is of high standing in this part of our governmental affairs. Mr. Ishiwatari is thoroughly versed in criminal jurisprudence and is well known for his ability. They are most competent representatives of this Government, and it may easily be supposed that on their return from Europe still further reforms will be introduced into our prison system. Besides these delegates, other prominent citizens attended the prison congress in their private capacity.

## VIII.

### THE RISE AND PROGRESS OF THE PRISON ASSOCIATION OF TOKYO.

An association for the purpose of improving prisons and everything connected with them was established in Japan in 1888. The membership included over 4,000 persons. In 1889 this prison association was reorganized with a view to enlarge the scope of the work, and Mr. Keigo Kiyoura, now minister of justice, was elected president, Mr. Shigejiro Ogawa, prison superintendent, was elected vice-president, and Mr. Yoshio Yamagami, prison superintendent, was elected chairman of a committee appointed by the association. The membership has gradually increased until the association has over 10,000, among whom are prison officials, other executive officials, judges, public procurators, scientific men, politicians, business men, barristers, doctors, and religious men. The association publishes a monthly magazine, which is distributed to all the members. Local committees in the various prefectures frequently meet to discuss prison affairs, and these discussions are heard with great interest by prison officers, and use is made of them in their administration of prisons. The association looks after discharged prisoners and is doing its best to keep such persons from returning to criminal ways by assisting them to

lead honest lives. It is believed that great good will result from these efforts in the future.

## IX.

### SOCIETIES FOR AIDING DISCHARGED PRISONERS.

This work is as yet imperfect in Japan, though there are 25 such societies which have looked after 2,345 persons, 711 of whom found means of self-support; 354 had the promise of aid from outside; 24 died; 475 escaped, and 31 were again committed to prison on the repetition of crimes; 35 were ordered to leave the societies for sufficient reasons; 272 withdrew without known reasons, and the remaining 443 are still cared for by the societies. Thirteen other societies are preparing to aid discharged prisoners. Monks, benevolent persons, business men, and others have begun to show an interest in this work and to help in finding employment for these men. This augurs well for the future.

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[The letters B, F, G, and J refer to the Belgian, French, German, and Japanese codes.]

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